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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 24

IN THE MATTER OF FLORIDA EAST COAST RAILWAY CO.,

Debtor,

ST. JOE PAPER CO., a corporation, and JESSIE BALL duPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, RAILWAY LABOR EXECUTIVES ASSOCIATION, SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY SYSTEM and F. K. CONN,

Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY

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No. 24

IN THE MATTER OF FLORIDA EAST COAST RAILWAY CO.,

Debtor,

ST. JOE PAPER CO., a corporation, and JESSIE BALL duPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, RAILWAY LABOR EXECUTIVES ASSOCIATION, SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY SYSTEM and F. K. CONN,

Petitioners,

VS.

ATLANTIC COAST LINE RAILROAD CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY

This Court granted a writ of certiorari limited to Question I presented by the petition in this case (formerly No. 670). Writs were also granted in three other cases, now Nos. 33, 36 and 37, limited to the same question.

The writ relates to an order of the Court of Appeals, Fifth Circuit, sitting *en banc*, entered on January 19, 1953,

by which that Court (Chief Judge HUTCHESON, Judges HOLMES and RIVES, with Judges BORAH and RUSSELL dissenting) reversed an order dated March 11, 1952 of the District Court for the Southern District of Florida (Circuit Judge STRUM sitting as a District Judge) and directed the District Court to approve a plan of reorganization of the Debtor, which the Interstate Commerce Commission had approved and certified to the District Court pursuant to Section 77 of the Bankruptcy Act.

The plan, referred to herein as "the Commission's Plan" or simply as "the Plan", provides that the properties of the Debtor (with certain exceptions) shall be transferred to Atlantic Coast Line Railroad Company by a merger or consolidation of the two corporations or a transfer and conveyance by the Debtor's Trustees, and that the Atlantic Coast Line shall turn over cash and Atlantic Coast Line securities (two classes of bonds and two classes of stock) to be distributed among the creditors of the Debtor.

The petitioners' briefs which are answered herein.

The petitioners herein have filed three briefs:

One for St. Joe Paper Company, the Trustees under the Will of Alfred I. duPont and F. K. Conn, to which we shall refer as the "St. Joe Paper Company brief" (on occasion we shall refer to these three petitioners collectively as the St. Joe Paper Company);

A separate brief for the Southern Railway Company (and its affiliated system companies) and Seaboard Air Line Railroad Company, to which we shall refer as the "Southern-Seaboard brief";

A third brief for Railway Labor Executives' Association, to which we shall refer as the "R. L. E. A. brief."

The respondent is filing separate briefs in Nos. 33, 36 and 37.

OPINIONS BELOW.

The opinion of the Court of Appeals (II, 717-733*) is reported: *In re Florida East Coast Ry. Co.* 201 F. 2d 325. The opinion of Circuit Judge STRUM in the District Court (I, 127-168) is reported: *In re Florida East Coast Ry. Co.*, 103 F. Supp. 825.

The Commission approved the Plan initially in its Fifth Supplemental Report of July 12, 1951, *Florida East Coast Railway Company Reorganization*, 282 I. C. C. 81-191, and the Commission modified the Plan slightly, and approved it as modified, in its Sixth Supplemental Report of October 25, 1951, and its Order of the same date, *Florida East Coast Railway Company Reorganization*, 282 I. C. C. 195-226. Photo-lithographed copies of the Fifth and Sixth Supplemental Reports and the Order of October 25, 1951 will be found consecutively at the front of Volume I of the Record. The definitive Plan will be found in the Order (282 I. C. C. 213-226).

* * * * *

An earlier plan, providing for a unification of the Debtor with the Atlantic Coast Line, which was approved in the Commission's Third and Fourth Supplemental Reports, *Florida East Coast Railway Company Reorganization*, 267 I. C. C. 295-391, 267 I. C. C. 729-759,** was the subject of an opinion in the District Court (Circuit Judge SIBLEY), *In re Florida East Coast Ry. Co.*, 81 F. Supp. 926, and an appeal, *Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 179 F. 2d 538. Atlantic Coast Line Railroad Company, respondent now, petitioned for certiorari, which was denied,

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* In this and similar citations the Roman numerals refer to the volume of the printed record and the Arabic numbers to the page.

** Photo-lithographed copies of these two Reports will be found in Volume IV of the Record, immediately following a photo-lithographed copy of the Second Supplemental Report.

Atlantic Coast Line Railroad Co. v. *St. Joe Paper Co.*, 339 U. S. 929.*

The record.

The printed record consists of six Volumes. Nos. I-III comprise the printed record on appeal in the Court of Appeals, with the proceedings in the Court of Appeals at the back of Volume II. Nos. IV-VI comprise the printed record in the Court of Appeals on the prior appeal.

The unprinted record consists of everything which was before the Court of Appeals in unprinted form. It contains everything in the Atlantic Coast Line's Designation of Contents of Record (I, 173-229) which is not in any of Volumes I-VI.

JURISDICTION.

The writ was granted under 28 U. S. C. § 1254.

THE QUESTION PRESENTED.

Four petitions for certiorari were filed, Nos. 670, 702, 705 and 710. This Court's order granting certiorari, dated May 4, 1953, reads:

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* The Commission first approved a plan on April 6, 1942, *Florida East Coast Railway Company Reorganisation*, 252 I. C. C. 423 (VI 528-640). After consideration of petitions for modifications the plan was modified in certain respects and approved as modified in the Commission's Supplemental Report of August 10, 1942, *Florida East Coast Railway Company Reorganisation*, 253 I. C. C. 731 (VI 641-689). On October 19, 1943 District Judge Strum sustained objections to the plan and remanded it to the Commission, *In re Florida East Coast Ry. Co.*, 52 F. Supp. 420 (VI, 690-697). After hearings the Commission approved a plan for an "internal reorganization" on January 8, 1945 in its Second Supplemental Report *Florida East Coast Railway Company Reorganisation*, 261 I. C. C. 151-193. (A photo-lithographed copy of the Second Supplemental Report will be found at the front of Volume IV of the record.) After the filing of various petitions for modifications, some of which contained requests for further hearing, the Commission reopened the case (267 I. C. C. 295-296).

"The petitions for writs of certiorari are granted limited to question 1 presented by the petition for writ of certiorari in No. 670."

The petitioners' original statement of Question I.

The petitioners' statement of the Question I in the petition for a writ was as follows (p. 2-3, italics in original):

"It being clear that Section 77 of the Bankruptcy Act, as enacted in 1933, did not authorize the Interstate Commerce Commission to present a plan of reorganization of a railroad involving a 'forced' merger of the debtor Railway with another railroad, the question is whether amendments to the 1933 Act, made in 1935, do authorize forced mergers.

"The Act of 1933 for railroad reorganizations in bankruptcy contained in subdivision (b) a so called consistency clause which qualified the powers of the Commission in respect of mergers, by expressly providing that a merger would have to be brought about by compliance with *'provisions'* of the Interstate Commerce Act which allowed mergers *only* if requested and agreed to by the carrier and then approved by the Commission, after notice to the Governors of the states, and after hearing communities and shippers served by the carriers. This 'consistency' provision in this legislation was repeated in subd. (e) of the 1933 Act, where it was said that transfers of property or consolidations or mergers may be made 'to the extent contemplated by the plan *consistent with the purposes* of the Interstate Commerce Act as amended'. It will be noted that the clause in (b) used the word 'provisions' and the clause in (e) used the word 'purposes'. By amendments in 1935 these two 'consistency' clauses were consolidated and transplanted from (b) and (e) to subdivision (f).

"In the 1935 Act, subd. (f), the clause allowing

transfer and mergers had the qualification 'to the extent contemplated by the plan' and 'not inconsistent with the provisions and purposes of Chapter 1 of Title 49 as on August 27, 1935 or thereafter amended.'

"The narrow question is therefore whether the mere transfer of the 'consistency' clauses from subdivisions (b) and (e) of subdivision (f) altered the meaning of the clauses and gave to the Interstate Commerce Commission a power to force mergers, which was withheld from it under the Act of 1933."

As thus stated the question presented conformed closely to Judge SIBLEY's holding on January 22, 1949, which was adopted below by dissenting Judges RUSSELL and BORAH (II, 731-733; 201 F. 2d 331-332). The key sentences in Judge SIBLEY's opinion read as follows (V, 475; 81 F. Supp. 926, 932, italics supplied):

"It is very earnestly argued that Subsection b which gives the specifications for a plan, in saying it 'may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation,' etc., does not mean a forced merger, which the Interstate Commerce Act, 49 U. S. C. A. §1 et seq., has never permitted the Commission to compel, though Congress has often considered the matter. *The history of the legislation in adopting Section 77 in 1933, is pointed to as showing that Congress was then concerned that no such thing was to be done under Section 77; and so again in 1935 when the section was revised; and that the reference to the Interstate Commerce Act in Subsection f which the Commission thinks applies only to its actions after confirmations of a plan, was intended to apply throughout and became accidentally misplaced in redrafting the Act. Without reciting the history, I think this contention is true.*"

Thus the petitioners' case before Judge SIBLEY in 1949, and before the Court of Appeals in 1949 and in 1952, was based on their arguments with respect to legislative history and particularly on the argument that the clause which they called the "consistency clause" had a certain meaning and effect in the original Section 77 in 1933 but became "accidentally misplaced in redrafting the Act".

The petitioners' original statement of Question I and the petitioners' arguments involve incorrect premises as to the respondent's contentions.

The petitioners' original statement of the question presented, their arguments before Judge SIBLEY and their present arguments all imply that it is conceded that because of the "consistency clause" in the original Section 77 (the 1933 Act) there could not be a "forced merger" in that Act, and that the only question is as to the effect of the transposition of the clause when Section 77 was revised in 1935.

The respondent has never conceded that the "consistency clause" in the 1933 Act prevented the consummation of a plan of reorganization for a merger over such opposition as is present in this case. As we point out in more detail later (p. 65-67, 113-116), the respondent's position has always been that the "consistency clause", wherever located in Section 77, has related to public interest matters and that the inability to put through a plan of reorganization under the 1933 Act over such opposition as is present in this case was due solely to the requirement that any plan, whether providing for a merger or not, had to be approved by two-thirds in amount of each class of creditors (47 Stat. 1478). In the 1935 revision of Section 77 the so-called "cram-down" provision, under which such opposition as exists in this case can be overridden, was added to the Act. The result was to make it feasible, by the combined action

of the Commission and the Court, to have a "forced merger" in the sense of one opposed by the holders of a majority in amount of a large and important class of bonds.

This Court's decision in Unexcelled Chemical Corp. v. United States and the petitioners' abandonment of the argument about accidental misplacement of the "consistency clause."

On March 9, 1953, very shortly before the petitions for certiorari herein were filed, this Court decided *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59. That decision seems to dispose of any argument based on a claim that the "consistency clause" was "accidentally misplaced", if the language of Section 77 is plain. Justice DOUGLAS said for the Court (p. 64):

> "Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved. But when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final—save for questions of constitutional power which have not even been intimated here."

In any event the petitioners no longer contend that there was a *misplacement* of the consistency clause. The St. Joe Paper Company brief says (p. 19):

> "There is no explanation in the legislative history as to why the transposition was made. All that can be said is that the legislative draftsman thought subdivision (f) was an appropriate place for it, and why was he not right?"

The petitioners' new statement of the question presented.

The brief of the St. Joe Paper Company now states the "sole question presented" (p. 2-3):

"The sole question presented is whether the amendments made in 1935 to Section 77 of the Bankruptcy Act give the Interstate Commerce Commission authority to approve and certify to the United States District Court a plan for reorganization of a bankrupt railroad which provides for a merger of the bankrupt and another railroad corporation, by a transfer of the property of the bankrupt railroad to another railroad, in exchange for securities of the transferee railroad, when the plan for merger has not been initiated or consented to by the bankrupt road but is vigorously opposed by the bondholders who are the equitable owners of the bankrupt.

"The petitioners' contention, which was stated as question 1 in our petition for certiorari (No. 670, Oct. Term, 1952), is that Congress has for many years in the Interstate Commerce Act deliberately and consistently withheld from the Interstate Commerce Commission authority to order or compel consolidation of railroads, and that it limited the Commission's authority to approving mergers initiated and agreed to by the carriers involved, and that the express provisions of Section 77 of the Bankruptcy Act as enacted in 1933 and as amended in 1935 preserved such limitations, and withheld from the Commission any authority to initiate, approve or certify to the District Courts any plan of reorganization under Section 77 of the Bankruptcy Act requiring a merger not agreed to by the carriers involved."

Comments on the petitioner's new statement of the question presented.

It is for this Court to decide how far the petitioners may go beyond the limits of the question which this Court undertook to review.

Counsel for the St. Joe Paper Company now argue *for the first time* that the Commission's approval of the Plan in this case was barred by the *express provisions* of

Section 77 of the Bankruptcy Act (p. 16-21). On all previous occasions the emphasis, if not the entire argument, has been based on "legislative history".

The new statement of the question presented contains serious ambiguities.

The first part of the first paragraph is clear but the paragraph slips into vagueness and errors when it says that the "plan for merger has not been initiated or consented to by the bankrupt road but is vigorously opposed by the bondholders who are the equitable owners of the bankrupt". We show later that the Plan in this case is not vigorously opposed by all the bondholders (p. 43) and that the bondholders in question are not "the equitable owners of the bankrupt" (p. 75-76).

The second paragraph says that the Congress "withheld from the Interstate Commerce Commission authority to order or compel consolidation of railroads". In this case the Commission did not *order* or *compel* the consolidation of any railroads—it approved a plan of reorganization which provides for a consolidation but the consolidation cannot take place until the plan has been confirmed by the Court and will then take place *as the result of the combined authority of the Commission and the Court.* The second paragraph also says that the Commission has no authority to approve a plan "requiring a merger not agreed to by the carriers involved"; this would make it appear that the absence of the consent of the Florida East Coast Railway Company, the Debtor, which is a mere corporate shell, is fatal, but counsel for the St. Joe Paper Company later argue that the "stockholders of the Florida East Coast Railway Company are in no position either to consent or object on behalf of the Company" and they assert that the "bondholders are the equitable owners of the property" (p. 20).

The question restated.

Counsel for the petitioners have invariably, and we think inevitably, used undefined, indefinite, non-statutory terms. A reasonably explicit statement of the proposition on which they stand should be of help to this Court. Such a statement can best be related to the facts of the case. In the first point in the Argument herein we show precisely what the petitioners must be assumed to be contending (p. 49-54) but a summary will be helpful here in advance of the statement of the case.

The directly material facts are as follows:

The Commission found that the equity of the stockholders of the Florida East Coast Railway Company has no value.

The First and Refunding Mortgage Bonds of the Florida East Coast Railway Company are a lien on much the largest part, but not all, of the assets of the Debtor. There are unmortgaged assets having a value somewhat in excess of $1,000,000. There are unsecured claims in excess of $2,500,000.

The St. Joe Paper Company owns more than 50% in amount of the First and Refunding Mortgage Bonds and is opposed to the Plan. A relatively small number of other bondholders are also opposed to the Plan. On no theory can as much as 76% in *amount* of the Bonds be recorded as in opposition to the Plan. A larger *number* were recorded in the District Court as favoring the Plan. (There is no argument in any of the briefs which would make the opposition of 76%, 90% or 99% any more significant than the opposition of the St. Joe Paper Company which owns more than 50%.)

The question which the petitioners argue is this:

Was the Commission required to obtain the consent of the St. Joe Paper Company to the Plan before the Commission approved the Plan? Does the opposition

of the St. Joe Paper Company to such a Plan block the Plan no matter how advantageous it may be to the holders of the First and Refunding Mortgage Bonds as a class, no matter how greatly the Plan may serve the public interest and how incompatible with the public interest the St. Joe Paper Company's plan may be, and no matter what may be the motive for the St. Joe Paper Company's opposition?

The petitioners stand on the proposition that there can *never* be what they call a "forced merger" under the present provisions of Section 77. If their construction of the statute were sound, the failure to obtain advance approval of a majority in amount of such a class of creditors as the holders of the First and Refunding Mortgage Bonds would make it immaterial what advantages a merger plan might have, or what disadvantages might flow from any alternative plan.

The St. Joe Paper Company's attempt to introduce a second question relating to the dismissal of the reorganization proceedings and the "alternative equity plan".

The St. Joe Paper Company brief argues in point IV (p. 32) that Judge STRAUM's dismissal of the reorganization proceedings under Section 77 of the Bankruptcy Act was justified. The last two paragraphs of the argument relate to what we call the "alternative equity plan" and were presumably included in the hope of obtaining not only approval of the dismissal of the reorganization proceedings but also a blessing on the alternative equity plan.

It seems too plain to require discussion that this part of the St. Joe Paper Company brief constitutes an attempt to introduce a question on which this Court has not undertaken to pass. However, we refer later (p. 40-43, 145-148) to Judge STRAUM's dismissal of the reorganization proceedings and to the "alternative equity plan".

STATUTES INVOLVED.

The statutes involved are Section 77 of the Bankruptcy Act (11 U. S. C. § 205) and Section 5 of the Interstate Commerce Act (49 U. S. C. § 5).

The pertinent portions are set forth in full in Appendix A hereto.

Since the orders in the District Court and the Court of Appeals related to the *approval* of the Plan by the Commission, any question before this Court relates most directly to the Commission's power to approve a Plan. For reasons which are developed in the argument later, the provisions of Section 77 relating to the approval by the Court, confirmation and execution (or consummation) may be considered for whatever relation they may have to the provisions that deal directly with approval by the Commission; but the provisions of Section 77 which relate directly to approval are obviously the most pertinent of any of the statutes that are involved. *Incredible as it may seem, none of the petitioners' briefs herein quotes or cites the present provisions of Section 77 which prescribe the attributes of a plan of reorganization and relate directly to approval of a plan by the Commission.* The provisions in question are in subsections (b), (d) and (e).

Section 77(b) provides (Appendix A, p. i, italics supplied):

> "(b) A plan of reorganization within the meaning of this section * * * (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations* * * *."

Section 77(d) first prescribes the procedure in connection with the filing of plans and hearings before the Commission. The next to the last sentence of the first paragraph concludes as follows (Appendix A, p. ii):

> "• • • the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan."

Subsection (d) thus applies unqualifiedly to *any* plan within the meaning of subsection (b). There is no hint that the consent of the debtor or any of the debtor's stockholders or bondholders should be obtained before the Commission approves a plan which falls within the terms of subsection (b).

The reference in subsection (d) to the "requirements" of subsection (e) is to the findings which the Judge must make before approving the plan pursuant to subsection (e), including the finding that the plan is "fair and equitable" (Appendix A, p. ii-iv). But subsection (e), which governs the approval of a plan by the Court, is like subsection (d) in that it applies without qualification to any plan which falls within the terms of subsection (b).

Subsections (b), (d) and (e) are the subsections which relate directly to the approval of a plan. Subsection (d), which relates to the approval of a plan by the Commission, refers to both subsection (b) and subsection (e) and is thus tied in with them. But it does not refer to any other subsections.

After a plan has been approved by the Commission and the Court, it is submitted to the security holders. The Commission then certifies the results of the submission to

the District Court, and subsection (e) provides (Appendix A, p. iv, italics supplied):

> "Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interest or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)*: * * *."

The italicized proviso is known as the "cram-down provision". Except for the proviso, which was added when Section 77 was revised in 1935, the St. Joe Paper Company could block the Commission's Plan by continuing to hold the Bonds which it now owns and then voting against the Plan (47 Stat. 1478). The cram-down provision, which was definitively construed by this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495, authorizes the Court to override the opposition of the St. Joe Paper Company. Thus the enactment of the cram-

down provision in 1935 made it feasible to effect a "forced merger" in the sense of a merger opposed by the holders of a majority in amount of the First and Refunding Mortgage Bonds.

It will be observed that the quoted paragraph of subsection (e), including the cram-down provision, applies to any plan which has been approved by the Commission and the Court. *There is no qualification or limitation.*

The clause which the petitioners call the "consistency clause" is in subsection (f). That subsection relates generally to the execution or consummation of a plan which has previously been approved and confirmed.

The "consistency clause" reads as follows (Appendix A, p. iv-v):

> "Upon confirmation of a plan, the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended."

This is the *only* provision of Section 77 which the petitioners cite as nullifying, modifying or qualifying the express provisions of subsections (b), (d) and (e) which we have quoted above.

Chapter 1 of Title 49 is the Interstate Commerce Act. The pertinent paragraphs of Section 5 thereof are set forth in full in Appendix A (p. v-ix). Neither Section 5 nor any other Section of the Interstate Commerce Act contains any reference to the opposition or consent of bondholders of either a solvent or an insolvent carrier.

The arguments by which the petitioners seek to utilize the "consistency clause" to override the express provisions of Section 77 are discussed later in this brief.

STATEMENT OF THE CASE.

We shall divide our statement of the case into two parts, the first dealing with the parties and their respective interests in the case and the second containing so much of the history of the case as appears to us possibly material to the question presented.

STATEMENT OF THE CASE—THE PARTIES AND THEIR INTERESTS.

We shall describe briefly the debtor, the respondent and the petitioners.*

Florida East Coast Railway Company.

The Florida East Coast has a principal line between Jacksonville and Miami and other branches and extensions. It has $37,500,000 par value of common stock, the equity in which has been found to be without value (267 I. C. C. 383); equipment obligations which would be assumed under the Plan; and First Mortgage Bonds which would be paid in cash.

There are $45,000,000 principal amount of First and Refunding Mortgage Bonds on which there is over $35,000,000 of accrued interest.

There are unmortgaged assets which the Commission valued at $1,177,356 and unsecured claims against the unmortgaged assets of over $2,500,000 (282 I. C. C. 176-181).

Atlantic Coast Line Railroad Company.

The respondent has a main line between Richmond and Jacksonville, a main line between Jacksonville and Tampa and other lines (including branches) reaching points in Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida (267 I. C. C. 310).

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* We do not include in this brief any description of the petitioners in Nos. 33, 36 and 37.

The Atlantic Coast Line's relationship with the Florida East Coast has been long and close. The statements in the St. Joe Paper Company brief (p. 8-9) and the Southern-Seaboard brief (p. 8-10) about the traffic relationships between East Coast and its three trunk line connections—the Atlantic Coast Line, the Southern and the Seaboard—should be corrected and supplemented.

The Commission found in 1947 that the Florida East Coast's passenger interchange with lines other than the Atlantic Coast Line is "comparatively negligible" (267 I. C. C. 312). In other words, over the decades during which the Florida East Coast has been independent it has been the Atlantic Coast Line, not the Southern or the Seaboard, which has worked jointly with the Florida East Coast in building up the heavy and important passenger traffic to and from the east coast of Florida.

With respect to freight, the Commission found in 1947 (267 I. C. C. 312):

> "The freight-traffic interchange between the Coast Line system and the debtor about equals the debtor's interchanges with all other railroads in the case of traffic originated on the debtor's line, and is somewhat in excess thereof in the case of traffic terminated on the debtor's line."

(By the time of the Commission's hearings in 1950 the proportion had changed somewhat and more recent figures will be found in the Southern-Seaboard brief at page 9.)

The respondent has contended and believes that the unification of the Florida East Coast and the Atlantic Coast Line is in every respect a "natural".

The St. Joe Paper Company and the duPont Trust.

The St. Joe Paper Company is an operating-holding company controlled by the trustees of a trust created by the Will of Alfred I. duPont. The Commission's Third Supplemental Report, dated April 8, 1947, contains a

description of the St. Joe Paper Company and the duPont Trust and, except as indicated, what we say here will be taken from that description (267 I. C. C. 313-316).

At the time of the hearing in the District Court the St. Joe Paper Company owned $23,259,000 of the Florida East Coast Railway Company First and Refunding Mortgage Bonds and the duPont Trust owned $1,993,000, making a total of $25,252,000, which is 56.12% of the issue of $45,000,000 principal amount.*

The St. Joe Paper Company has an important paper business at Port St. Joe and owns all of the securities of Apalachicola Northern Railroad Company, which serves the St. Joe Paper Company plant. Its other interests, in addition to its holdings of First and Refunding Mortgage Bonds of Florida East Coast Railway Company, include "a large amount of land in west Florida, a telephone and telegraph company operating in and around St. Joe, extensive and valuable real-estate holdings, including some hotels, on the east coast of Florida in Jacksonville, Miami, Palatka, Daytona Beach, Fort Pierce, West Palm Beach, and other points [and] a controlling interest in the Florida National Bank & Trust Company of Miami" (267 I. C. C. 311).

The will of Alfred I. duPont, creating the duPont Trust, provides that the income, subject to certain annuities and life interests of Mr. duPont's widow (267 I. C. C. 314),

> "* * * is to be devoted to a charitable Delaware corporation to be created by the trustees and entitled 'The Nemours Foundation.' This foundation is for the purpose of maintaining the family estate in Delaware known as 'Nemours' as an institution for the care and treatment of crippled children, not incurable, and the care of old men and women, first consideration to be given to residents of Delaware. Any surplus income may be used in contributions of

* For the record sources of these data see pages 6-7 of the respondent's brief in No. 36.

specifically to the refunding bondholders. The full jurisdiction and control over them is in this court. The refunding bondholders by an overwhelming majority do not consent. If the court has the power as a court of bankruptcy to consent for them, under the circumstances of this case it should refuse to do so. I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by permitting a merger to be part of a plan. This conclusion makes it unnecessary to determine whether the court's power in bankruptcy could be extended to force a merger consistently with the Fifth Amendment. It also ends this plan. But I am assured in argument that the decision if made either way will be appealed, so it will be useful to decide the merits of the plan, if it is hereafter held that a forced merger is lawful."

Judge SIBLEY's opinion deserves special study because it was substantially adopted by Judges BORAH and RUSSELL in their dissent from the order now under review (201 F. 2d 325, 331-332; II, 731-733).

The decision of the Court of Appeals in January, 1950 and the opinions in that Court.

An appeal was taken to the Court of Appeals by the Atlantic Coast Line, and the Deposit Committee which has since disbanded, and was heard by Judges HUTCHESON, HOLMES and RUSSELL. *Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.* (1950) 179 F. 2d 538.

Judges HUTCHESON and HOLMES disagreed with Judge SIBLEY's view that the objection of a "majority in amount of the affected parties" was fatal to a so-called "merger" plan. Judge RUSSELL agreed with Judge SIBLEY.

Judges HUTCHESON and RUSSELL thought that the Commission had been preoccupied with questions of the public interest, particularly that of control, and that it had ac-

other worthy charitable institutions established for the same purposes."

The names of the Trustees of the duPont Trust will be found in the title. Jessie Ball duPont is Mr. duPont's widow. In speaking of Edward Ball, her brother, one of the Trustees, the Commission said in 1947 that he had been "the spokesman and active negotiator" for the Trust, "if not the dominating influence in this reorganization proceeding" (267 I. C. C. 313). He is referred to in many of the documents in the record and in much of the testimony.

The Trust is very large: in 1944 its holdings included, not only 76½% of the stock of the St. Joe Paper Company and more than $30,000,000 in duPont and General Motors stock, but a controlling interest in the entire Florida National Group of Banks (exclusive of one owned by the St. Joe Paper Company).

Railway Labor Executives' Association.

The Railway Labor Executives' Association is described in the separate brief filed on behalf of that Association.

The interest of the Association in this case is asserted in its brief to be as follows (p. 3):

> "If the judgment of the Court of Appeals is affirmed and the reorganization plan approved by the Commission subsequently consummated, a large number of these employees will lose their jobs entirely, others will be compelled to move to distant points on the Atlantic Coast Line system in order to retain railroad employment, and many will lose valuable rights of seniority as well as service credits toward annuities payable to them under the Railroad Retirement Act."

There is no basis in the record for the statement that "a large number of these employees will lose their jobs entirely". While the respondent established that large savings would *eventually* be realized by the elimination of 319

positions, the evidence showed that this would be brought about principally, if not entirely, by deaths, retirements and resignations in the ordinary course.*

It is not disputed that some of the employees will have to move to other points on the Atlantic Coast Line.

The statement that "many will lose valuable rights of seniority as well as service credits towards annuities payable to them under the Railroad Retirement Act" is not supported by the record. Since counsel for the Association do not even cite the record on this subject, we see no need to cull from the record the data relating to it.

We repeat the statement, which was made in the respondent's brief in opposition to the petition for certiorari, that the protection of employees under the Commission's Plan is as broad as, if not broader than, any that has ever been provided in connection with a unification of two railroads. We there showed just what that protection is (p. 57-58).

The whole argument in the brief of the Railway Labor Executives' Association really rests on the fact the St. Joe Paper Company opposes the Plan. In no sense is any *right* of the Association or the employees impinged upon by the consummation of a so-called "forced merger". If the St. Joe Paper Company should withdraw its opposition to the Plan—or if it should sell its holdings of First and Refunding Mortgage Bonds and the purchaser should not oppose the Plan—the arguments of the Railway Labor Executives' Association would automatically collapse.

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* This evidence was contained in turn-over studies and testimony explaining them. The following table lists the numbers of the Exhibits comprising the turn-over studies and the pages of the transcript of the record before the Interstate Commerce Commission in which the various studies were explained.

Ex. No.	*Pages of Transcript*
391	5678-5679, 5694-5700
394	5678-5679, 5701-5702, 5954
403	5678-5679, 5919-5925

All are included in the unprinted portions of the record.

The Southern and the Seaboard.

A separate brief has been filed on behalf of Southern Railway Company (and its affiliated companies) and the Seaboard Air Line Railroad Company, to which we refer as the Southern and the Seaboard.

The Southern-Seaboard brief quotes four consecutive paragraphs from Judge STRUM's opinion in the District Court and introduces the quotation by saying (p. 9, italics in original):

> "The *damnum* to Southern and Seaboard if the decision of the Court of Appeals is affirmed and if the forced merger plan is approved, is sufficiently shown by the following finding by Circuit Court Judge Strum in the District Court below, who had before him the most up-to-date evidence on this question, and whose factual finding *quoad hoc* is unchallenged:"

The statement that Judge STRUM's "factual finding *quoad hoc* is unchallenged" is simply astounding. We do not know what to make of such a statement in a brief of such responsible counsel.

Key findings by Judge STRUM which the Southern-Seaboard brief quotes were that the addition of the Florida East Coast to the Atlantic Coast Line

> "* * * would effectively close the 'open gateway,' which now exists at Jacksonville, and give A. C. L. a virtual monopoly over the interchange business at Jacksonville. Apparently the Commission saw no 'grave consequence' for the public in this situation".

These statements in Judge STRUM's opinion were challenged most explicitly as recently as April 6, 1953 in the respondent's brief in opposition to the petitioners' petition for certiorari (p. 60-62). They were also challenged in Atlantic Coast Line's brief in the Court of Appeals, dated July 31, 1952 (p. 67-70), and in the Atlantic Coast Line's reply brief of September 25, 1952 (p. 104-107).

The effect on the Southern and the Seaboard of a unifi-

cordingly not taken due care in discharging its responsibility of providing fair and equitable treatment for the bondholders. Judge HOLMES disagreed and voted for approval of the Plan.

The result was a remand of the case to the Commission on the following terms, which were stated in Judge HUTCHESON's opinion (179 F. 2d 544):

> "In remanding the case, however, for further proceedings, we remand it for the purpose of working out a really fair and equitable plan and without prejudice in doing so to the due consideration of any fair and equitable plan for bringing this matter to an end, including such a plan providing for a merger with, or sale to, the Coast Line either with or without the approval of the security holders."

With respect to the illegality of a forced merger, Judge RUSSELL expressed agreement with Judge SIBLEY (179 F. 2d 545). The view of the majority on the point, Judges HUTCHESON and HOLMES, will be found in Judge HOLMES' dissenting opinion (179 F. 2d 545-548; at the time Judge HUTCHESON expressed agreement with Judge HOLMES' conclusion on the point (p. 543-544) and he later indicated that he had been "in full agreement with the dissenting Judge, that the Commission *could propose* and approve such a plan" (201 F. 2d p. 326; II, 720; italics in original). The most pertinent paragraphs of Judge HOLMES' opinion read as follows (179 F. 2d p. 546):

> "The disapproval of the plan for reasons not within the province of the court to consider was clearly erroneous; but the fundamental error that infects the judgment under review, and necessitates its reversal, is the holding that Section 77 does not permit a merger such as is proposed, and that this feature 'ends this plan'. In the first place, neither the statute nor the plan says anything about a forced merger. The statute expressly provides that a plan of reorganization may

cation of the Florida East Coast and Atlantic Coast Line —and the effect on the Jacksonville gateway—were discussed in the Commission's Third Supplemental Report in 1947 (267 I. C. C. 335-339) and in the Fifth Supplemental Report dated July 12, 1951 (282 I. C. C. 140-142). The Court of Appeals expressly sustained the Commission's findings and found that Judge Strum's findings were "themselves without support in law or in fact" (II, 727, 729-730; 201 F. 2d 329, 330).

Each of the three trunk lines now solicits interline shipments moving from or to the Florida East Coast via the soliciting trunk line.

Section IV of the Plan provides (282 I. C. C. 213):

> "All existing through routes via Jacksonville, Fla., to and from points now served by the debtor in connection with Seaboard Air Line Railroad Company and Southern Railway system shall be kept open."

The same provision was in the plan which the Commission approved in its Third and Fourth Supplemental Reports (267 I. C. C. 748). It means that after the consummation of the Plan the Southern and Seaboard will still be able to solicit traffic to and from the lines now operated by the Florida East Coast.

The two railroads did not even contend that the "open gateway" would be closed. Their contention was more along the line of what they say at page 8 of their present brief, i.e., that they would "be seriously injured in their respective competitive positions in Jacksonville". However, the Commission found (267 I. C. C. 338):

> "The Southern seems to feel that the merger would enable the Coast Line to solicit more effectively on basis of better service, but this would obviously be in the public interest."

As to the Seaboard, which did not intervene until after the record before the Commission had been closed, the Commission said (267 I. C. C. 338):

> "What is said with respect to Southern's motive of self-interest and the public interest applies equally to Seaboard, especially since Seaboard already serves with its own rails probably the most productive section of the debtor's territory."

For further findings by the Commission we refer to portions of the Commission's Third and Fifth Supplemental Reports cited above.

As in the case of the Railway Labor Executives' Association, no rights of the Southern and Seaboard will be impinged upon by the consummation of a so-called "forced merger". All of the arguments made by the two railroads rest on the fact that the St. Joe Paper Company did not consent to the Plan before it was approved by the Commission. While in those arguments counsel for the railroads resort to such undefined expressions as "forced merger" and "compulsory consolidation" and undertake to discuss national transportation policies, manifestly neither the railroad industry as a whole nor the Southern and Seaboard have any justiciable interest in establishing that the holders of the majority of an amount of a class of mortgage bonds can defeat a merger plan. The two railroads would be happy to defeat the Plan in this case but that does not give them any right to defeat it.

F. K. Conn.

F. K. Conn is an individual holder of First and Refunding Mortgage Bonds. The most recent information in the record about his holdings is that in January, 1949, he held $387,500 of Bonds (V, 381). As appears in the respondent's brief in No. 36, Conn was associated with other bondholders who held $590,500 additional at the time of the hearings in the District Court (p. 6-7). However, none of them is a petitioner in this Court.

As we show later in discussing what is known as the alternative equity plan (p. 42-43), Conn apparently has a

particular, personal interest in preferring that plan to the Commission's Plan.

STATEMENT OF THE CASE—NARRATIVE STATEMENT.

The petitioners' challenge of the order below, as approving an unauthorized "forced merger", is based on two factors. Hence only those two factors are relevant to the question before this Court.

The first is that the Plan provides that the Debtor's properties shall be vested in Atlantic Coast Line Railroad Company by a merger, consolidation or transfer and conveyance (282 I. C. C. 213).

The second factor is that the Plan was not approved in advance, and is in fact opposed, by the St. Joe Paper Company, the holder of a majority in amount of the First and Refunding Mortgage Bonds of the Debtor.

In our Statement of the Case we shall limit ourselves in general to matters which have a bearing on the two factors just mentioned and on the history in the case of the petitioners' "forced merger" argument, except that we shall also include some data about the dismissal of the proceeding and the "alternative equity plan", which are referred to in the last point of the St. Joe Paper Company brief (p. 32).

The proceedings in equity and under Section 77 from August 31, 1931 to November, 1944.

On August 31, 1931 a consent receivership of the Florida East Coast Company was begun (I, 127).

On January 25, 1941, nine and one-half years later, reorganization proceedings were instituted under Section 77 of the Bankruptcy Act (VI, 529).

On April 6, 1942 the Commission approved a so-called "internal plan". (VI, 528-640), which it modified in certain respects and approved as modified on August 10, 1942 (VI, 641-689).

On October 19, 1943 District Judge STRUM sustained objections to that plan and remanded the case to the Commission (VI, 690-697).

On May 3, 1944, there was a hearing before Interstate Commerce Commission Examiners on the remand of the case from the District Court.

The acquisition by the St. Joe Paper Company of a majority in amount of the First and Refunding Mortgage Bonds.

By May 3, 1944, the day of the hearing before the Commission on the remand of the case from the District Court, the St. Joe Paper Company had become the owner of $23,250,000 principal amount of the First and Refunding Mortgage Bonds, over 50% of the issue of $45,000,000 principal amount (I. C. C. transcript, 1146-1150).*

The Lynch plan in November 1944 and the position taken by the Lynch Interests at that time with respect to the transfer of control over the opposition of the St. Joe Paper Company.

After the Commission hearing on the remand had been closed, but before the Commission had acted, the Lynch Interests (now petitioners in No. 33) filed a petition for a reopening of the case and for leave to file a plan of reorganization under which a new corporation would be formed that would be controlled by Atlantic Coast Line Railroad Company (261 I. C. C. 187-189). Under the Lynch plan the holders of the Debtor's First and Refunding Mortgage Bonds would have received first mortgage bonds, preferred stock and common stock of the new corporation and the Atlantic Coast Line would have obtained control of the new Florida East Coast by guaranteeing the interest on the new first mortgage bonds and by paying $3,600,000 for 60% of the new common stock.

As pointed out in the respondent's brief in No. 33

* Included in the unprinted portion of the record (I, 182).

(p. 10-11), counsel for the Lynch Interests (the petitioners in No. 33) then took the position that the Commission could approve the Lynch plan despite the opposition of the St. Joe Paper Company.*

The Commission denied the petition of the Lynch Interests (261 I. C. C. 187-193) and on January 8, 1945 approved a plan for an internal reorganization of the Debtor (261 I. C. C. 151-193).

The St. Joe Paper Company brief points out (p. 9-10) the distinction which the Commission then made between this case and *Soo Line Reorganization*, 252 I. C. C. 525 and notes that on January 8, 1945 the Commission spoke in its report of the "aggressive opposition from the holder of a majority in principal amount of the first and refunding bonds". The brief says that the Commission was not persuaded at that time "that it had power to force a merger, without the consent of the equitable owners of the Florida East Coast". However, the Commission's doubts at that time were quite natural because this Court had not yet decided *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495, and until the *Denver & Rio Grande* decision was handed down many thought that the "cram-down" provision might have only a very limited scope. There is no suggestion in the Commission's Report that any doubts which the Commission had in January, 1945 about a so-called "forced merger" had any relation to the "consistency clause", legislative history or any of the other things on which the petitioners now rely. The *first* suggestion along those lines was made in January, 1948, as we explain later.

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* While it is true that the Lynch plan did not provide for a merger or consolidation of the Florida East Coast and the Atlantic Coast Line or a transfer of the former's assets to the latter, that is immaterial because it provided for an acquisition of control and the provisions of Section 5(2) and 5(4) of the Interstate Commerce Act apply to acquisitions of control as well as to mergers, consolidations and transfers of assets.

The argument before the full Commission on May 29, 1945: the position taken by the St. Joe Paper Company at that time.

Several of the parties, including the St. Joe Paper Company, S. A. Lynch and the Atlantic Coast Line, filed petitions for modification of the plan of January 8, 1945 and "in most of the petitions requests for further hearings are made" (267 I. C. C. 295-296).

On May 29, 1945 the various petitions for modification of the plan of January 8, 1945 and for a reopening of the case were argued before the full Commission. The counsel who argued on behalf of St. Joe Paper Company were Messrs. Giles J. Patterson and John R. Turney, now among the attorneys for the St. Joe Paper Company in this Court.

On the argument there was the following colloquy between Commissioner Barnard and Mr. Turney (p. 1428-1429, italics supplied):*

> "Commr. Barnard: They talk about public convenience and necessity. As I understand it, the duPont interests control 53 per cent.
>
> Mr. Turney: Yes, a little more.
>
> Commr. Barnard: And now they are becoming owners, and they now are held to own 53 per cent. That ownership carries with it, ordinarily, the right of dominion over that property; then has that been changed by 77?
>
> Mr. Turney: If your Honor please, my view about that is not worth a great deal, because I am neither a 77 nor a constitutional lawyer,** but my feeling is this: *That under the fifth provision of para-*

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* The transcript of the argument is included in the unprinted portion of the record (I, 181).

** Mr. Turney was unduly modest. He has been counsel for important parties in reorganization proceedings involving The Chicago, Rock Island & Pacific Railway Company, St. Louis Southwestern Railway Company and Alton Railroad Company as well as in this case.

graph E of the Act, the Commission could sell the property of the bankrupt to another railroad company for securities of that railroad company, and compel the holders of the present securities to accept those securities.* I believe though, that like Kansas City, that is about as far as they can go."

* * * * *

Thus Mr. Turney was explicit in stating that Section 77 authorized precisely the type of so-called "forced merger" which the Commission later approved.

Further developments before the "legislative history" argument was first advanced on January 8, 1948.

On July 20, 1945 the Commission reopened the proceedings for the receipt of evidence relating to modifications of the plan of January 8, 1945 "and for the proposal of other plans" (267 I. C. C. 296). On October 22, 1945 the Atlantic Coast Line filed a plan which called for a unification of the two railroads by a merger, consolidation or transfer of the properties of the Florida East Coast to the Atlantic Coast Line (267 I. C. C. 297-298). Other parties proposed modifications of the Commission's plan of January 8, 1945. Hearings were held in Washington and West Palm Beach in November, 1945, lasting 16 days; briefs were filed in February, 1946; Examiner Ralph H. Jewell issued a proposed report in June, 1946; exceptions to the proposed report, briefs and reply briefs were filed; there was an argument before the full Commission in October, 1946, lasting for two days; and under date of April 8, 1947 the Commission issued its Third Supplemental Report approving, by a vote of five to four, a plan which provided for a unification of the Florida East Coast and the Atlantic Coast Line (267 I. C. C. 295-391). The terms of the plan

* This is an obvious typographical error for (b).

were materially different from those which the Atlantic Coast Line had proposed.

The St. Joe Paper Company filed a petition for modification, reconsideration, reopening and reargument, dated June 6, 1947, and a supplement thereto dated July 18, 1947 and other parties filed similar petitions (I, 187-188). Briefs and reply briefs were then filed.

There was then a reargument before the full Commission on January 7-9, 1948.

During this entire period to January, 1948 neither counsel for the St. Joe Paper Company nor any other counsel made any arguments at any time, in briefs or orally, about the illegality of a so-called "forced merger" because of the "consistency clause", "legislative history" or any other things on which they rely now. Despite the vigorous contest following the Atlantic Coast Line's filing of a proposed plan in 1945, it was more than two years before the arguments on which the petitioners now rely emerged.*

The argument, based principally on legislative history, that a forced merger is illegal, advanced for the first time on January 8, 1948.

On the reargument before the Commission on January 7-9, 1948 the St. Joe Paper Company's counsel for the first time advanced contentions similar to those now relied upon—that a "forced merger" is illegal in the light of the legislative history of Section 77 (I. C. C. transcript of argument of January 8, 1948, p. 4995-5007; I, 189). The argument was quite full, covering much the same ground that was later covered before Judge SIBLEY and before the Court of Appeals. (There was no claim, as there is now,

* The Commission's Third Supplemental Report of April 8, 1947 correctly summarized the position which the St. Joe Paper Company undertook to maintain during the period of more than two years from the filing of the Atlantic Coast Line's "merger plan" in October 1945 until January 8, 1948 and the Atlantic Coast Line's answer to the St. Joe Paper Company's argument (267 I. C. C. p. 303).

that Section 77 and the Interstate Commerce Act, taken by themselves, supported the contention that a so-called "forced merger" was illegal; the reliance was on legislative history.) On the following day counsel for the Atlantic Coast Line answered (p. 5200-5206).

The Commission's disposition and full discussion of the "forced merger" argument.

On March 25, 1948 the Commission handed down its Fourth Supplemental Report, in which it dealt with the "forced merger" argument very fully (267 I. C. C. 730-732):

> *"Legality of a plan of reorganization providing for merger of the debtor's properties with the Coast Line.*—In our third supplemental report, we discussed our power under the statute to approve a plan transferring the debtor's property to the Coast Line, and concluded that such a plan would in all respects conform to the provisions of section 77, particularly subsections (b), (d), and (e), and would not transgress the priority rule as expressed in *Northern Pac. Ry. Co.* v. *Boyd*, 228 U. S. 483.
>
> "The opponents of the approved merger plan seek to read into subsection (b) language not contained therein. They suggest that the language 'another corporation' in subparagraph (b) (5) means a corporation organized to carry out the plan. No such qualification is suggested by the language itself, and the statutory language must prevail. Had Congress intended to impose such a limitation on our power, the assumption is that it would have added the necessary language to make effective that restriction.
>
> "The opponents of the approved merger plan also suggest that a merger such as referred to in subparagraph (b) (5) must be a voluntary merger, and resort was had to the congressional proceedings inci-

dent to the enactment of section 77 in an effort to substantiate that contention. Certainly the language of the statute does not so state. Where the language of a statute is plain and unqualified, that language must prevail. *Helvering* v. *City Bank Co.*, 296 U. S. 85.

"The opponents of the approved merger plan seek to subordinate section 77 of the Bankruptcy Act to the Interstate Commerce Act. They point out that subsection (f) of section 77 provides that upon confirmation of a plan we shall grant authority 'for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic to the extent contemplated by the plan and not inconsistent with the provisions and purposes of Chapter I of Title 49'. They contend that since the Interstate Commerce Act does not authorize us to require involuntary mergers our hands are likewise tied under the Bankruptcy Act. We do not agree with that contention. The quoted provision of subsection (f) of section 77 is not a limitation on the plan which we are authorized to approve under subsection (b). Nothing is said in subsection (b) nor in subsection (e) regarding the Interstate Commerce Act. When we reach this provision (subsection (f)) in the statute, all that is necessary to approve and confirm the plan has been provided for. The plan is then ready to be made effective. It would be strange for Congress, after giving us express authority to do certain things under the Bankruptcy Act in order to rehabilitate an insolvent carrier, to thereafter limit our authority by the express provision of the Interstate Commerce Act. The Interstate Commerce Act deals with solvent carriers and contains no machinery for dealing with bankrupts. Its 'provisions and purposes' are not directed to the rehabilitation of insolvent railroads. To hold that our powers under the Bankruptcy

Act to promulgate a plan of reorganization for a debtor corporation are subordinate to our powers under the Interstate Commerce Act would defeat the bankruptcy statute.

"We construe the reference to the Interstate Commerce Act contained in subsection (f) of section 77 to mean that after the plan has been adopted by this Commission and the court, this Commission shall grant such additional authority as may be required to carry out the plan, observing the provisions of the Interstate Commerce Act where applicable, and the national transportation policy contained therein.

"The language used in subsection (f) is 'not inconsistent with.' The approved merger plan is not inconsistent with the Interstate Commerce Act. There is no prohibition in the Interstate Commerce Act against the merger of an insolvent railroad with a solvent railroad. We may, pursuant to our power under section 77 of the Bankruptcy Act to deal with bankrupt railroads, promulgate a plan which provides that the bankrupt shall be merged with a solvent corporation, and the court which has jurisdiction of the bankrupt's property may confirm the plan. The solvent corporation here is willing. There is nothing in the Interstate Commerce Act to prohibit us from approving such a transaction.

"As applied to this proceeding the argument that the word 'merger', contained in subparagraph (b) (5) means a voluntary merger is beside the point. There is nothing of record to show that the merger of the Florida East Coast with the Atlantic Coast Line is objected to by either. The stockholders of the Florida East Coast have not objected. The objection comes from certain of its bondholders.

"Any contention that the merger must be voluntary is nullified by the 1935 amendment to section 77, which provides, in subsection (e) that 'if the plan has not

been accepted by the creditors and stockholders, the judge may, nevertheless, confirm the plan over their objections.' This provision is not restricted to any one of the several plans authorized in subsection (b). It refers to any plan authorized by that subsection. Subsection (b) specifically authorizes a plan which may provide for the merger of the debtor corporation with another corporation. Any involuntary aspects of such merger fade completely in the face of the power of the court to confirm the plan providing for such merger over the objection of creditors or stockholders."

The dissent from the Report was not based on the proposition that a so-called "forced merger" was unlawful in the light of the legislative history but rather on the thought that the plan involved a violation of the absolute priority rule. *Northern Pacific Railway Company* v. *Boyd* (1913) 228 U. S. 482.*

Judge Sibley's decision in January, 1949 in the District Court.

When the plan approved in the Commission's Fourth Supplemental Report of March 25, 1948 was certified to the District Court, District Judge STRUM was ill. The objections to the plan did not come on for hearing until January, 1949 and Circuit Judge SAMUEL H. SIBLEY, who has since retired, was designated to hold the District Court pursuant to 28 U. S. C. Section 291(c).

On January 22, 1949 Judge SIBLEY handed down an opinion in which he said (81 F. Supp. 926, 932; V, 475-476; italics supplied):

"It is very earnestly argued that Subsection b which gives the specifications for a plan, in saying

* The basis of the dissent did not differ materially from the basis of the dissent to the Third Supplemental Report (267 I. C. C. 390-391), which was written long before the emergence on January 8, 1948 of the contention about a "forced merger".

it 'may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation,' etc., does not mean a forced merger, which the Interstate Commerce Act, 49 U. S. C. A. § 1 et seq., has never permitted the Commission to compel, though Congress has often considered the matter. *The history of the legislation in adopting Section 77 in 1933, is pointed to as showing that Congress was then concerned that no such thing was to be done under Section 77; and so again in 1935 when the section was revised; and that the reference to the Interstate Commerce Act in Subsection f which the Commission thinks applies only to its actions after confirmation of a plan, was intended to apply throughout and became accidentally misplaced in redrafting the Act. Without reciting the history, I think this contention is true.* Of late years courts have perhaps gone too far in using legislative history in a very loose way to supplement or change an Act as written. If this question related directly to the liberties or property of the people I would be loath to do it now. But it relates to the extent of the power granted by Congress to its own agent. And the Interstate Commerce Act can be construed with Section 77 to ascertain what Congress really meant by a railroad 'merger or consolidation', and whether it meant one consented to by both parties to it. No one would contend that the Coast Line could be forced. But the Commission argues that this debtor has also consented, because its stockholders have not appeared to object. I think that does not follow. It is expressly found that the debtor's insolvency is such that the stockholders are not interested parties. The debtor, its property and affairs now belong in equity to the creditors, and more

include a merger. This plan contemplates, first, the voluntary consent of the railroad not in reorganization and, second, the approval of the plan by the court having jurisdiction of every asset of the debtor. The latter's insolvency is such that the stockholders are not interested parties. The first-mortgage bondholders are to be fully paid in cash, and there can be no complaint in their behalf. The refunding bondholders are the parties primarily interested; but they are not (as the court below held) the equitable owners of the property. Under Section 77, as amended, they are merely creditors with a lien that is preserved in bankruptcy. The property has been dedicated to a public use, subject to well known rights of stockholders and creditors. It is now in the custody of the bankruptcy court to be protected and administered under said section.

"Lienors do not become stockholders or succeed to the latter's rights merely because the debt secured by the lien so far exceeds the value of the property that nothing will be left for stockholders. The primary object of Section 77 is not the rehabilitation of a debtor that is hopelessly insolvent, but the protection of the priority rights of lienors and the continuation of the railroad as a going concern. Priority rights of lienors may involve a surrender of their liens in exchange for new securities of equal value. Under this section, it is for the Commission to prepare a plan that will insure against capitalization which is incompatible with the public interest. The judicial functions of the court are brigaded with the administrative powers of the Commission to determine congressional intent and to effectuate the legislative will. These powers or functions are not blended; they are exercised cooperatively but not jointly. The court has its limited duties to perform, as does the Commission; but each acts separately within its special sphere,

and neither is permitted to usurp the prerogatives of the other."

This Court's denial of certiorari; the remand to the Commission; the Commission's approval of the present Plan.

After the decision of the Court of Appeals the Atlantic Coast Line and the Deposit Committee filed a petition for a writ of certiorari, which was opposed by the St. Joe Paper Company and others and denied. *Atlantic Coast Line Railroad Co.* v. *St. Joe Paper Company* (1950) 339 U. S. 929.

The case was then remanded to the Commission and after extensive further hearings and all of the other necessary steps the Commission issued its Fifth and Sixth Supplemental Reports (reproduced in the front of Volume I of the Record) and approved the present Plan and certified it to the District Court. Seven Commissioners joined in the Fifth and Sixth Supplemental Reports and three dissented.

The Commission treated the opinions in the Court of Appeals as establishing the legality of a so-called "forced merger" (282 I. C. C. 118-119) and there was no reconsideration of the subject in either of the Reports. The minority again referred to the *Boyd* case but the dissent in the Fifth Report also said (282 I. C. C. 190):

> "I recognize that in view of the decision of the court of appeals in this case it is the 'law of the case,' described in *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 199, as 'only a discretionary rule of practice' that the Commission has the power to approve such a merger as the approved plan now includes. The arguments presented have not convinced me that the Bankruptcy Act properly may be used to implement a transaction which is beyond the scope and powers of the Commission under the Interstate Commerce Act."

The so-called "Bondholders' Agreement": the development of the "alternative equity plan" and the program for a dismissal of the proceeding.

Between the certification of the Plan to the District Court and the hearings in that Court, all of the petitioners who are now before this Court in Nos. 24, 33, 36 and 37, except the two railroads and the Railway Labor Executives' Association, became parties to a so-called "Bondholders' Agreement" by which they became obligated to support a new plan of reorganization and also to support a program for a dismissal of the Section 77 proceeding and the execution of the new plan in the moribund equity receivership, which would be reactivated for that purpose (I, 25-39). The St. Joe Paper Company now seeks a dismissal of the proceeding and a blessing from this Court on the new plan of reorganization, the "alternative equity plan" (St. Joe Paper Company brief, p. 32). Although in that connection the St. Joe Paper Company has gone far outside the scope of the question which this Court undertook to review, a brief summary pertaining to the alternative equity plan and the program for a dismissal of the proceeding seems fitting.

In the District Court and the Court of Appeals the Atlantic Coast Line attacked the alternative equity plan as a thoroughly bad plan on the following grounds:

First: The plan provides for a unique voting trust, which must have been intended to mask the fact that under the plan the St. Joe Paper Company would have immediate control of the reorganized company despite the Commission's findings that such control would not be compatible with the public interest (282 I. C. C. 187). The effect of the paragraph of the plan relating to the voting trust would be that the voting trustees would vote the stock at stockholders' meetings as directed by the holders of the voting trust certificates (called trustees' certificates), except that the paragraph contains mandatory provisions as to the designation of a minority of the directors (I, 36-

37).* The St. Joe Paper Company would hold a majority of the voting trust certificates and would actually designate a majority of the board of directors during the period of the voting trusteeship. The voting trustees would be nothing more than tellers at the elections of the directors.

Second: The alternative equity plan authorizes an initial issue of $20,000,000 of New Mortgage Series A Bonds, bearing 4% interest, the amount of which could be increased for various purposes. The Commission expressly found that if there were a so-called "internal plan" of reorganization of the Florida East Coast not more than $13,500,000 of 4% fixed interest bonds should be issued (282 I. C. C. 158).

Third: In every report which the Commission has issued in the last ten years the Commission has found that the plan of reorganization should provide for a reserve for passenger stations, particularly a passenger station at Miami (261 I. C. C. 167; 267 I. C. C. 362; 282 I. C. C. 172). The alternative equity plan contains no provision for any such reserve.

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* The fact that the St. Joe Paper Company as the holder of a majority in amount of the voting trust certificates would have the right to designate a large majority of the directors may not be apparent from a first reading of the paragraph relating to the voting trust, but there can be no doubt about the matter. The paragraph provides (I, 36-37):

> "It shall be the duty of the voting trustees to vote said stock annually to elect directors of the reorganized company. The voting trustees, or a majority thereof, if they approve such directions, shall vote said stock at all stockholders' meetings as directed by the holders of such trustees' certificates * * *"

The portion omitted relates to the designation of the minority directors.

The paragraph requires the voting trustees to vote pursuant to the directions of the holders of the voting trustees' certificates "if they approve such directions". It does not suggest any possible basis for disapproving any directions. One of the three voting trustees would be selected by the St. Joe Paper Company. The provisions with respect to the other two are not such as to suggest any possibility that they would be unfriendly to St. Joe Paper Company control (I, 36).

Fourth: As the petitioners' brief says (p. 32), under the alternative plan St. Joe Paper Company would have a right to receive only new stock in exchange for its Bonds and all of the other bondholders would have the right to take New Mortgage Series A Bonds.*

With respect to the new bonds and new stock issuable under a similar plan which the St. Joe Paper Company proposed in 1950 the Commission found that the new bonds would sell at 100 and the new stock at 25 (282 I. C. C. 151). Thus the St. Joe Paper Company—an operating-holding company for a predominantly charitable trust—agreed in the alternative equity plan to most unequal treatment. All of the bondholder-petitioners now before this Court would benefit from that unequal treatment under the alternative equity plan, although, as pointed out in the respondent's brief in No. 36 at page 11, even so the alternative equity plan would not provide as much in value for the other bondholders as the Commission's Plan.

Fifth: As an additional incentive to the petitioner-bondholders the alternative equity plan provided that directors should be designated by the petitioner-bondholders as follows:

S. A. Lynch Corporation	2
F. K. Conn	1
Welbon (Claughton) Group	1

We do not know to what extent any of the petitioner-bondholders were influenced by this incentive, because none of them (and no representative of any of them) took the stand before Judge Strum, but the provision certainly gave each of the petitioner-bondholders a particular, personal interest in having the alternative equity plan go through. And it was a most extraordinary provision, particularly as there would be every reason to expect S. A. Lynch Cor-

* They also have the right to take stock, or a combination of stock and bonds, but that is obviously a mere matter of window dressing, as was shown in expert evidence about the prospective value of the new bonds and stock.

poration, F. K. Conn and the Welbon (Claughton) Group to take bonds rather than stock under the plan for practically all of their holdings.

There was no hearing in the District Court on the alternative equity plan. The parties to the Bondholders' Agreement treated the plan as before the Court for the purpose of defeating the Commission's Plan but not for the purpose of being itself inspected or analyzed.

The bondholder opposition to the Commission's Plan in the District Court.

At pages 6-9 of respondent's brief in No. 36 we give the details with respect to the bondholder opposition to the Commission's Plan in the District Court. It can be summarized as follows:

The St. Joe Paper Company and the duPont Trust, holding $25,252,000, or 56.12%, were opposed. So also were F. K. Conn, a petitioner herein (and his associates) and the Lynch Interests and Welbon (Claughton) Group, the petitioners in Nos. 33 and 37; they number about ten bondholders with aggregate holdings of $5,870,500 or 13.04%. This made a total of 69.16% which opposed the Plan and which were represented in Court.

In addition there were 73 identical motions to dismiss the proceeding which set forth that the signers held $2,855,448 or 6.35% of the total issue. The curious story of the 73 motions to dismiss was summarized in the respondent's brief in No. 670 (Appendix B, p. xiii-xiv). If the 6.35% be included as opposed to the Plan, a total of 75.51% can be recorded as opposed.

The Deposit Committee (since disbanded), which favored the Plan, represented 196 bondholders who held $437,900 of bonds or .97% of the total issue.

The balance of the $45,000,000 was not recorded as either opposed or favoring the plan. It amounts to $10,584,652 or 23.52%.

All of the comparatively small number of bondholders

who opposed the Plan had particular personal interests not common to the bondholders as a class, for their opposition.

Actually a much larger number of bondholders were recorded as favoring the plan than as opposing it.

Judge Strum's disapproval of the plan and dismissal of the Section 77 proceedings.

The Plan came on for hearing before Circuit Judge STRUM, who, after being appointed to the Court of Appeals, was designated pursuant to 28 U. S. C. 291 (c) to hold the District Court.

On March 11, 1952 Judge STRUM issued an opinion and order in which he disapproved the Plan on various grounds (103 F. Supp. 825-847; I, 127-163).

Referring to the opinions in the Court of Appeals in 1950, Judge STRUM expressed the view that it was "the settled law of this case" that a "forced merger" is lawful (103 F. Supp. 834; I, 140). Consequently, he did not express any opinion of his own on that issue. Since the various grounds on which he disapproved the Plan were later disapproved *in toto* by the Court of Appeals, there is no need to review them.

Judge STRUM also dismissed the proceeding. In his opinion, which takes up 41 pages of the record, he did not even mention any of the criticisms of the alternative equity plan and of the program for a dismissal (I, 127-168; 103 F. Supp. 847).

The decision of the Court of Appeals and the opinions in that Court about a "forced merger".

On the appeal from Judge STRUM's decision the Court of Appeals, sitting *en banc*, reconsidered the legality of a "forced merger".

The majority, Judges HUTCHESON, HOLMES and RIVES, said that they were "not in any doubt that, under the plain terms of subsection (b)(5) of Section 77 of the Act, 11

U. S. C. A. Section 205 • • • the commission was precisely authorized to formulate and recommend a plan providing, as the fourth plan does, for the merger of East Coast and Coast Line" (201 F. 2d 329; II, 725-726).

We refer under the next subheading to the Court's findings as to the merits of the plan.

Judge RUSSELL, writing for Judge BORAH and himself, again announced his agreement with Judge SIBLEY (201 F. 2d 331-332; II, 731-733).

The Southern-Seaboard brief asserts (p. 16-17) that the majority of the Court did not reconsider the legality of a "forced merger" but that the minority did. Then, in counting the Circuit Judges who have voted their way or against them, they include Judge BORAH but exclude Judge RIVES.

Since Judge RIVES joined in Chief Judge HUTCHESON's opinion, which indicates quite definitely that the Court did reconsider the legality of a forced merger, it requires considerable ingenuity to develop a method of counting which excludes Judge RIVES but includes Judge BORAH.

Judge RUSSELL wrote an opinion for the two dissenting Judges. None of the petitioners' briefs quotes the opinion in full. We think the effect of it is correctly summarized when we say that Judges RUSSELL and BORAH adopted the "forced merger" part of Judge SIBLEY's opinion, which we have quoted.

The merits of the Plan.

The Commission did not find merely that the Plan would be "compatible with the public interest"—it found that the Plan would result in many advantages to the public (282 I. C. C. 187-188). It also found (*id.*) that it would not be compatible with the public interest for the St. Joe Paper Company to control the Debtor's property, that the interests of the railroad employees would be adequately protected under the Plan and that any effect of the Plan upon the Southern and Seaboard would not adversely

affect the public interest. The Court of Appeals found that there was "abundant evidence" to support the Commission's public interest findings (II, 727; 201 F. 2d 329).

With respect to the fairness of the Plan to the bondholders and the reasons for the opposition to it the Court of Appeals found (II, 728; 201 F. 2d 329-330):

> "[The record] shows a most careful and painstaking effort on the part of the commission to properly, adequately, and independently value both the securities held by the bondholders and those to be received by them in exchange and that its finding that the plan was fair and equitable finds full support in the evidence.
>
> "Indeed, an examination of all the testimony now available touching on and dealing with the valuations which under the statute it was for the commission to make, demonstrates, we think, beyond any peradventure that the commission's findings and estimates of the respective future earnings of East Coast and Coast Line and of the present and future values of the securities to be given in exchange for each other was most favorable to the bondholders of East Coast.
>
> "The same careful examination shows that but for the fact, which apparently dominates and controls most of the bondholders in this controversy, that they are primarily concerned not with obtaining value received for their securities but with a conversion of their bonds into a title to the East Coast properties, so that they will own and manage the railroad, all of them would be found to agree that what they will receive for their bonds under the plan will be of a value equal to, or more than, that of their bonds."

The treatment of the bondholders was largely based on "estimates of the respective future earnings of the Atlantic Coast and East Coast lines". The fairness of the plan was tested by evidence and findings with respect to prospective "fair market values" of the securities which

would be issued under the Plan and those which could be issued under an internal plan. On these vital points the Court of Appeals found that the Plan "was most favorable to the bondholders of East Coast".

The Court's finding that the desire for control animated the opponents of the Plan accounts for the opposition to the Plan.

The Court of Appeals also found (II, 729-730; 201 F. 2d 330):

> "• • • that the findings of the trial judge, rejecting the commission's findings as to the public interest and as to valuation, and declaring that the plan is unfair and inequitable, are themselves without support in law or in fact;"

The foregoing quotations are from the majority opinion but the minority did not express any disagreement with the majority as to these findings (II, 731-733; 201 F. 2d 331-332).

SUMMARY OF THE ARGUMENT.

1. The petitioners' use of undefined, loose, non-statutory terms makes it desirable to state their contention precisely and with relation to the facts of this case, which are as follows:

The Commission found that the equity of the stockholders of the Florida East Coast Railway Company has no value.

The First and Refunding Mortgage Bonds of the Florida East Coast Railway Company are a lien on much the largest part, but not all, of the assets of the Debtor. There are unmortgaged assets having a value somewhat in excess of $1,000,000 and unsecured claims of more than $2,500,000.

The St. Joe Paper Company owns a majority in amount of the First and Refunding Mortgage Bonds and is opposed to the Plan. A relatively small number of other bondholders are also opposed to the Plan. On no theory can as much as 76% in *amount* of the Bonds be regarded as in opposition to the Plan. A large *number* were recorded in the District Court as favoring the Plan. (There is no argument in any of the briefs which would make the opposition of 76%, 90% or 99% any more significant than the opposition of the St. Joe Paper Company which owns more than 50%).

The petitioners' contention is this:

Because the St. Joe Paper Company failed to approve the Commission's Plan in advance of the approval of the Plan by the Commission, the Commission had no authority to approve the Plan and it is illegal, no matter how advantageous it may be to the holders of the First and Refunding Mortgage Bonds as a class, no matter how greatly the Plan may serve the public interest and how incompatible with the public interest the St. Joe Paper

Company's plan may be, and no matter what may be the motive for the St. Joe Paper Company's opposition.

2. The pertinent provisions of Section 77 are clear and unambiguous.

Section 77(b) provides in part (italics supplied):

> "(b) A plan of reorganization within the meaning of this section * * * (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations* * * *."

Subsection (d), which relates to the approval of a plan by the Commission, and the provision of subsection (e) which relates to the approval of a plan by the Court and is incorporated by reference into subsection (d), both refer to any plan which falls within the terms of subsection (b).

None of the three subsections, (b), (d) and (e), makes any reference whatever to the consent of the debtor, its stockholders, bondholders or other creditors to a plan prior to the approval of the plan by the Commission or the Court.

The petitioners' briefs simply fail to quote these provisions of subsections (b), (d) and (e).

The paragraph in subsection (e) relating to confirmation and containing the "cram-down" provision, which was construed by this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495, applies to any plan of reorganization that may be approved.

The petitioners' entire argument rests on the "consistency clause" of subsection (f), which provides that authority to execute a plan shall be granted only to an extent

"not inconsistent with the provisions and purposes" of the Interstate Commerce Act. The petitioners say that it is "inconsistent with the provisions and purposes" of Section 5(2) of the Interstate Commerce Act for the Commission to approve a plan of reorganization that provides for a merger, consolidation or transfer of the assets of the debtor unless prior to the approval of the plan by the Commission there be a consent, if the Commission is going to hold that the stock is without value, of a majority in amount of such bondholders as may be the "equitable owners" of the debtor's property—or of a large part of the debtor's property.

But there is no reference anywhere in Section 5(2) to consents of bondholders or "equitable owners". There is not even any requirement in Section 5(2) for initiative or consent on the part of the transferor or its stockholders in the case of a transfer by a solvent carrier. Moreover, it is a primary purpose of Section 77 to deal with private rights of debtor corporations, their stockholders, bondholders and other creditors and the primary purpose of the Interstate Commerce Act is to protect the public interest. Section 77 and Section 5(2) should be applied consistently, but consistency does not require that the Commission and the Court should be deprived of powers which are expressly granted to them by Section 77 merely because the same powers are not granted to them by the Interstate Commerce Act.

3. Under Section 77 the trustee or trustees of a debtor have title to all of the assets of the debtor and can transfer them pursuant to an order of the Court which executes a plan of reorganization. No other consent, assent, initiative or act of the debtor is contemplated.

The bondholders in this case have not as "equitable owners of the property" taken "the place formerly held by its stockholders" with respect to mergers, consolidations

and transfers of assets. *Helvering* v. *Southwest Consolidated Corp.* (1942) 315 U. S. 194.

4. The contentions about the consistency clause and legislative history, which counsel for the St. Joe Paper Company first advanced in January, 1948, were an afterthought and have undergone marked changes since they were first advanced.

5. The construction of Section 77 adopted by the Commission and the Court of Appeals accords due weight to the public interest, which was emphasized in *Ecker* v. *Western Pacific Railroad Corp.* (1943) 318 U. S. 448, 468. That construction is in harmony with the Congressional policy favoring the unification of weak railroads and strong railroads. It is consistent with the underlying philosophy of this Court's decisions as to the disposition of trust assets and the respective rights of majorities and minorities.

The St. Joe Paper Company's contention is that it has a right to have the Florida East Coast reorganized independently and to have a majority stock interest in a new or reorganized company, irrespective of the effect on the public interest or on the interest of the holders of over $11,000,000 of unrepresented bonds. That contention is not significantly different from a demand of a holder of a majority beneficiary interest in a trust that the assets of the trust be sold to the majority holder at a price less favorable than could be obtained by sale to someone else. It conflicts with the basic philosophy of a long line of decisions of this Court.

6. All of the petitioners' arguments would apply to "mergers" within a railroad system or to a "merger" of two or more debtors, and if they were valid it would follow that many plans have been illegally approved, confirmed and consummated in Section 77 proceedings. One example is *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.* (C. C. A. 2, 1947) 161 F. 2d 413, cert. den.

Protective Committee for Bonds of Old Colony Railroad Co. v. New York, New Haven & Hartford Railroad Co. (1947) 331 U. S. 858, rehearing denied (1947) 332 U. S. 803.

The petitioners' proposed restriction on "mergers" would greatly impair the future usefulness of Section 77.

There is no basis for a distinction between intra-system mergers or mergers of debtors, on the one hand, and a transfer of the assets of a debtor to a so-called "outsider", on the other hand.

7. In most cases a requirement for an advance consent of "equitable owners" before the approval by the Commission of a plan of reorganization providing for a "merger" would introduce such confusion and uncertainty as to make it impracticable even to try to develop a plan of reorganization of that type—even a plan relating to two corporations in the same system unless one of the corporations were wholly owned by the other.

8. The findings of the Commission and of the Court of Appeals have established that

(1) The Commission's Plan is not merely "compatible with the public interest"; the public would derive many distinct advantages from the Plan.

(2) The Plan is not merely "fair and equitable" to the holders of the First and Refunding Mortgage Bonds as a class; it is "most favorable".

(3) The holders of at least $11,022,522 of Bonds have not opposed the Plan. It would be in their interest to have the Plan carried out.

(4) The St. Joe Paper Company's desire for control, and the incentives which the Paper Company has offered to the other bondholders, are responsible for the bondholder opposition to the Plan.

9. The history of railroad reorganizations and of Section 77, and particularly this Court's decisions in *National*

Surety Company v. *Cortelyou* (1933) 289 U. S. 426, *First National Bank* v. *Flershem* (1934) 290 U. S. 504, *Case* v. *Los Angeles Lumber Co.* (1939) 308 U. S. 106, *Consolidated Rock Products Co.* v. *DuBois* (1941) 312 U. S. 510, *Ecker* v. *Western Pacific Railroad Company* (1943) 318 U. S. 448, *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943) 318 U. S. 523, 565-566, and *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495, establish that the petitioners' construction of Section 77 as requiring the consent of the debtor, or of its stockholders or bondholders, prior to the Commission's approval of a plan, if the plan calls for a merger, is utterly inconsistent with the philosophy and objectives of Section 77 and if adopted would reintroduce into Section 77 reorganization procedure much of what was objectionable in equity reorganizations.

This Court's decisions were correctly analyzed by Judge SWAN for a unanimous Court in *In re New York, New Haven & Hartford R. Co.* (C. C. A. 2, 1945) 147 F. 2d 40, 49:

> "Section 77 manifests the intention of Congress to place reorganization under the leadership of the Commission (Ecker v. Western Pac. R. Corp., 318 U. S. 448, at page 468, 63 S. Ct. 692, at page 705, 87 L. Ed. page 468, and we cannot doubt that the Commission must approve the plan in the exercise of an independent judgment uninfluenced by the fact that interested parties have agreed upon its terms. Consequently it would be a serious departure from the statute if the Commission approved a valuation for Old Colony assets because of fears that, should it fix any other, a previous agreement negotiated by a substantial number of interested security holders would be upset, with consequent delay in consummating a reorganization."

10. The petitioners' legislative history data do not support their contention.

Their presentation of the data contains significant errors. Furthermore, the items are usually preceded or followed by comments which are not supported by the data themselves.

Many of the items, when correctly presented and analyzed, will be found to be adverse to the petitioners' contentions. The others are quite nebulous.

These weaknesses in the data should not obscure two points:

First: Since the provisions of Section 77 are unambiguous, there is no occasion for any resort to legislative history. *Ex parte Collett* (1949) 337 U. S. 55, 61; *Unexcelled Chemical Corp.* v. *United States* (1953) 345 U. S. 59.

Second: The data do not include any Committee Reports.

11. If the provisions of Section 77 were not plain and unambiguous, the Commission's construction would be entitled to great weight. *United States* v. *American Trucking Associations, Inc.* (1940) 310 U. S. 534, 549; *Medo Photo Supply Corp.* v. *National Labor Relations Board* (1944) 321 U. S. 678, 681 footnote; *National Labor Relations Board* v. *Hearst Publications, Inc.* (1944) 322 U. S. 111, 130-131; *Skidmore* v. *Swift & Co.* (1944) 323 U. S. 134; *Boutell* v. *Walling* (1946) 327 U. S. 463, 470-471.

The Commission's Fourth Supplemental Report contains a detailed and convincing analysis of the petitioners' contentions and of the pertinent provisions of Section 77 and the Interstate Commerce Act (267 I. C. C. 730-732), which we have quoted in full at pages 31-34 above.

In the Fifth Supplemental Report the minority said that they were not convinced "that the Bankruptcy Act

properly may be used to implement *a transaction which is beyond the scope and powers of the Commission under the Interstate Commerce Act*" (282 I. C. C. 190).

The respondent agrees that the carrying out of such a plan is "beyond the scope and powers of the Commission under the Interstate Commerce Act." But it is clearly within the scope and powers of the Commission *and the Court* under Section 77 of the Bankruptcy Act and it is *not* "inconsistent with the provisions and purposes of the Interstate Commerce Act". Section 77 authorizes plans of reorganization of bankrupt railroad corporations which are "beyond the scope and powers of the Commission under the Interstate Commerce Act", although not in any way inconsistent with the latter Act.

12. The "cram-down" provision of Section 77 empowers the Court to confirm the Commission's Plan in this case over the objection of the St. Joe Paper Company and any other bondholders which may oppose the Plan.

Under this Court's decision in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Corporation* (1946) 328 U. S. 495 the District Court should confirm the Plan, even though there be an adverse vote, except in one of the two contingencies referred to in this Court's opinion.

If the petitioners' arguments about the "cram-down" provision were sound, they would apply to any plan whether or not it provided for a so-called "merger".

They are the same arguments which were made unsuccessfully to this Court in the *Denver & Rio Grande* case and the legislative history data which the petitioners cite are the same data which were cited by the unsuccessful parties in that case.

13. There is no constitutional question which should affect the construction of Section 77. *Consolidated Rock Products Co.* v. *DuBois* (1941) 312 U. S. 510, *Ecker* v.

Western Pacific Railroad Company (1943) 318 U. S. 448, *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943) 318 U. S. 523, 565-566, and *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495, have removed all possible constitutional doubts.

14. The District Court's dismissal of the reorganization proceedings under Section 77 was not justified and the Court of Appeals was correct in so finding.

The alternative equity plan, which is referred to in Point IV of the St. Joe Paper Company brief, is a thoroughly bad plan. In three important respects it conflicts directly with findings of the Interstate Commerce Commission.

The program for a dismissal of the proceedings and the attempt to put through the alternative equity plan in the reactivated receivership cannot be defended. Among other things, it involved an attempt to circumvent the authority of the Interstate Commerce Commission over reorganization plans, whether in equity or under Section 77.

The whole program was a bald effort of the St. Joe Paper Company and a small group of associated bondholders completely to dominate the reorganization and to try to force the Commission to acquiesce in and authorize a plan which would be incompatible with the public interest and not as favorable to the unrepresented bondholders as the Commission's Plan.

ARGUMENT.

I.

The petitioners use undefined, loose, non-statutory terms.

The specific proposition on which they must stand is that the Commission had no power to approve the Plan because it had not previously been consented to by the holder or holders of a majority in amount of the First and Refunding Mortgage Bonds.

If that proposition were sound, it would mean that the Commission had no authority to approve the Plan because the St. Joe Paper Company did not consent to it in advance.

It would also mean that in other cases plans involving a merger, consolidation or transfer of corporate assets, even within a system, such as the transfer of the assets of the Old Colony to the reorganized New Haven and a large number of similar transfers which have been made in other reorganization cases, were not lawfully effected because they were not consented to in advance of the Commission's approval of the plans.

The provisions of Section 77 are precise. The Section prescribes the attributes of a plan of reorganization carefully and specifies explicitly, in sequence, the steps which are necessary to have and carry out a plan: (1) approval by the Commission, (2) approval by the Court, (3) submission for the vote, (4) confirmation, and (5) execution or consummation. The Section also is precise in its reference to debtors, to stockholders and to creditors. None of the provisions of Section 77 says or suggests anything that supports the petitioner's contentions. It is understandable, therefore, that those contentions all are stated in indefinite, undefined and non-statutory terms.

Whose consent do the petitioners say is required?

Judge SIBLEY held (V, 476; 81 F. Supp. 932):

> "I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by permitting a merger to be part a plan."

He did not define the words "affected parties," explain how a "majority in amount" was to be counted or suggest when and how it was to be determined whether a merger was "undesired".

The St. Joe Paper Company now insists that it is necessary to have "the consent of the carriers involved" (p. 8). However, since the stock of the Florida East Coast Railway Company has been held to be without value, they say that "the 5% bondholders are the equitable owners of the property" (p. 20) and that the Commission could not approve the Plan because it was "vigorously opposed by the bondholders who are the equitable owners of the bankrupt" (p. 2). Any implication that the Plan is vigorously opposed by *all* the bondholders is simply wrong, since there are holders of over $11,000,000 of Bonds who have not opposed the Plan in any way (see p. 43). Nor can the bondholders on any theory be said to be "the equitable owners of the bankrupt": the bankrupt itself is a corporate entity which is not owned by the bondholders and, as noted below, the bondholders could not be said to be even the "equitable owners" of the bankrupt's property since there are substantial unmortgaged assets.

The Southern-Seaboard brief does not contain anything remotely resembling a definition of the terms "forced merger" and "compulsory consolidation", which the brief uses. However, the railroads say (p. 8):

> "* * * that Section 77, as so amended, gives no power to the Commission, or to the courts below, or to the Commission 'brigaded' with the said courts, to coerce such an involuntary merger or consolidation over the opposition of the great majority of the equitable owners of the debtor."

The Southern-Seaboard brief does not indicate whether it is speaking of a majority in amount or of a majority in number and does not suggest how it can make any difference whether the "majority" is great or small. The oppo-

sition here is by a majority in amount, not a majority in number.

Counsel for the Railway Labor Executives' Association state the question presented as if it involved the circumstance that "* * * such merger or transfer has not been initiated or consented to by the debtor railroad but is opposed by the overwhelming number of its security holders who are its equitable owners" (p. 2). The implication that the Commission's Plan in this case is opposed by the *overwhelming number* of the bondholders is completely erroneous. Those who were on record in the District Court as favoring the Plan were much greater in number than those who were on record as opposing it, and much the largest number of bondholders are not on record as either opposing it or favoring it.*

The Mortgage Trustees in No. 36 recognize that the bondholders are at most "the equitable owners of the *mortgaged property*" (p. 6) and that there are unmortgaged assets valued at over $1,000,000 (282 I. C. C. 176-181). So they refer to the bondholders as the equitable owners of "substantially all of the assets of the debtor" (p. 7), treating the unmortgaged assets of over $1,000,000 as insubstantial.

The statement in the brief in No. 37 is that the Plan is illegal and unauthorized because it was not "consented to by the *majority of the* debtor's equitable owners" (p. 36, italics supplied). Like most of the briefs that in No. 37 treats the bondholders as if they owned the debtor (the corporate entity) or owned all of its assets, and for that there is no warrant.

It is difficult to discuss many of the arguments in the petitioners' briefs intelligently unless there be first some reasonably definite understanding as to whose opposition to the Plan is asserted to be significant.

* See respondent's brief in No. 36 at p. 6-9.

The facts are as follows (see p. 43):

The Plan was opposed in the District Court by the St. Joe Paper Company, which owns a majority in amount of the First and Refunding Mortgage Bonds. It was also opposed by certain other bondholders. The total *amount* which could on any theory be counted as opposing the Plan was less than 76%. The *number* of bondholders recorded as favoring the Plan was actually much larger than the number recorded as opposing it.

The First and Refunding Mortgage is a lien on much the largest part of the Debtor's assets, but by no means all. There are unmortgaged assets valued by the Commission at over $1,000,000 and a number of unsecured creditors whose claims exceed $2,500,000 (282 I. C. C. 176-181).

With these facts the only reasonably precise way to present the question which is involved is to say that the Plan is opposed by a holder or holders of a majority in amount of a class of bonds which are a lien on much the largest part, but not all, of the Debtor's assets. There is nothing in the petitioners' arguments to suggest that it is even possibly material that the Plan may be opposed by the holders of 75.5% rather than by a mere majority. We refer later to the characterization of the bondholders as the "equitable owners of the property".

The petitioners contend that the consent or consents which they say are required must be obtained in advance of the Commission's approval of the plan.

The petitioners' proposition is that the Commission cannot approve a plan of reorganization which provides for a merger, a consolidation or a transfer of the debtor's assets unless *prior to the approval by the Commission* there be a consent by whoever must under their theory consent (St. Joe Paper Company brief, p. 18-19).

This proposition is developed at length in the petitioners' brief in No. 37, which goes into considerable detail in discussing "the regular or special meeting of the equitable owners" which they say has to be held, and at which a majority in amount of the equitable owners must approve a plan, before the plan is approved by the Commission (p. 53-55).

We point out later, *first*, that the notion that Section 77 requires any such advance approval of the plan by the "equitable owners" is not merely without support in Section 77 but conflicts with the fundamental objectives and philosophy of Section 77 and, *second*, that in many cases it would be hopelessly impracticable to try to hold a meeting of "equitable owners"—for one thing, in most cases it would be impossible to determine, at least in advance of the approval of a plan, who were "equitable owners" of what.

At this juncture, however, the point which we wish to emphasize is that the petitioners all insist that the Commission's approval of the plan is illegal because the St. Joe Paper Company, the holder of a majority in amount of the First and Refunding Mortgage Bonds, did not approve the plan *in advance of the Commission's approval.*

If the petitioner's arguments were valid they would apply to a merger of several debtors or of several corporations within a system.

Judge SIBLEY said (V, 479; 81 F. Supp. 933-934):

> "This case is not as though the merging corporations were affiliates, and members of the same corporate family already. In such a case there is really a mere simplification of the corporate organization of interests already related."

In our brief in opposition to certiorari we pointed out (p. 38) that the distinction made by Judge SIBLEY is not permissible under the petitioner's theory.

We also cited *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.* (C. C. A. 2, 1947) 161 F. 2d 413, cert. den. *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & Hartford Railroad Co.* (1947) 331 U. S. 858, reh. den. (1947) 332 U. S. 803, as an example of a "forced merger", in the sense in which that term has been used by the petitioners, that was effected by authority of Section 77. We said that one of the outstanding things under Section 77 of the Bankruptcy Act was the extent to which unifications had been effected within railroad systems through reorganization plans and that, if the petitioner's theory were sound, many of such unifications would have been impossible.

This point is developed further below at pages 83-91. We observe here only that none of the petitioners makes any effort to sustain the distinction suggested by Judge SIBLEY. The petitioners' position must be taken to be that the opposition of the holder or holders of a majority in amount of a class of bonds such as the First and Refunding Mortgage Bonds in this case would block a merger even if the Florida East Coast already was in a "system" and were a subsidiary debtor in a Section 77 proceeding.

Summary statement of the petitioners' contention.

In view of the foregoing the petitioners' contention can be taken to be that the Commission may not approve a plan of reorganization that involves a merger, consolidation or a transfer of the assets of a debtor—whether within a "system" or involving two or more debtors in the same Section 77 proceeding — unless there be a consent, in advance of the Commission's approval of the plan, by the debtor or, if the stock of the debtor is held to be without value, by the holder or holders of a majority in amount of the class of bonds having a lien on the largest part of the debtor's assets.

We now proceed to see whether Section 77 affords any support for such a contention.

II.

The provisions of Section 77 afford no support whatever for the proposition that it was necessary for the Commission to obtain in advance the consent of anyone to the Plan.

Nor did the opposition of the St. Joe Paper Company and of other bondholders preclude approval of the Plan by the Commission.

Furthermore, under the plain language of Section 77 the opposition of the St. Joe Paper Company and the other petitioners to the Plan will not bar its confirmation and consummation.

In determining the issues in this case it is certainly logical first to examine the applicable statutes.

We have already pointed out (p. 13) the extraordinary fact that *none of the three petitioners' briefs quotes the provisions of subsection (b) of Section 77, which define a plan of reorganization, as it now reads or those of subsection (d), which relate directly to the approval of a plan by the Commission,* although those two provisions, taken together, obviously have the most direct bearing on the issues before the Court, since the petitioners' complaint is that the Commission should not have approved the Plan.* The St. Joe Paper Company brief quotes part of subsection (b) as it read in 1933 but not as it reads now, and does not quote subsection (d) at all (p. 3-4). The same thing is true of the Seaboard-Southern brief (p. 5). The brief of the Railway Labor Executives' Association does not quote any statutes on the ground that the "pertinent statutory provisions involved are adequately set forth" in the other briefs (p. 2).

We will refer first to the provisions of Section 77 which define a plan of reorganization, and then consecu-

* Nor do the petitioners quote the provision of subsection (e), relating to the approval of a plan by the Court, which is incorporated by reference into the provision of subsection (d) relating to the approval of the plan by the Commission.

tively to the provisions which relate to (1) the approval of a plan by the Commission, (2) approval by the Court, (3) confirmation and (4) execution or consummation. Section 77 deals with these four steps in the order in which they take place in a reorganization. Except as otherwise indicated, the texts of the pertinent provisions of Section 77 are to be found in Appendix A.

There are many references in the briefs to "certification" of a plan by the Commission to the Court. Certification is the mere act of transmittal of an approved plan to the Court.* The approval of a plan by the Commission is the important step.

The attributes of a plan of reorganization.

Section 77(b) provides in part (Appendix A, p. i-ii, italics supplied):

> "(b) A plan of reorganization within the meaning of this section * * * (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations* * * *."

Could there be a clearer provision authorizing a plan providing for transfer of the property of the debtor to another railroad corporation or the merger or consolidation of the debtor and another railroad corporation?

It has been argued in the past that the words "another corporation" were intended to refer only to a corporation organized to carry out the plan and possibly counsel for

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* Subsection (d) of Section 77 provides:

> "The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan."

the St. Joe Paper Company are still making a faint suggestion to that effect (p. 17). Such a suggestion cannot be entertained.

As the Commission said in 1948 (267 I. C. C. 730):

> "No such qualification is suggested by the language itself, and the statutory language must prevail. Had Congress intended to impose such a limitation on our power, the assumption is that it would have added the necessary language to make effective that restriction."

The equity device of a foreclosure sale and the subsequent transfer to an "entirely new railroad corporation", to which counsel for the St. Joe Paper Company refer, always involved a *transfer*. It never involved a *merger* or a *consolidation*. There can be no doubt that in Section 77(b)(5) the Congress was not thinking merely of the equity device: it was thinking of a unification of the debtor with another railroad corporation by a transfer, merger or a consolidation.

Section 77(b)(5) has been uniformly construed as authorizing a plan that provides for a transfer of the debtor's assets to another "outside" railroad corporation. In *Alton Railroad Company Reorganization* (1945) 261 I. C. C. 343, the Commission approved a Section 77 plan under which the Alton was transferred to the Gulf, Mobile and Ohio, an existing so-called "outsider" railroad corporation like the Atlantic Coast Line in this case. And in *New Jersey & New York Railroad Company Reorganization*, Finance Docket 13490, the Commission (by Division 4) approved a plan for the reorganization of The New Jersey and New York Railroad Company under which the debtor's properties would be transferred to Erie Railroad Company.

Starting then with the proposition that Section 77(b)(5) expressly contemplates a plan of reorganization that provides for "the transfer of any interest in or control of all or any part of the property of the debtor to another

corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations", we look at Section 77(b) to see whether there is anything therein which qualifies this broad language in any way, such as a requirement for the consent of the debtor, of its stockholders or of its bondholders. There is nothing (Appendix A, p. i-ii).

The approval of a plan by the Commission.

Section 77(d) provides for hearings before the Commission, after which

> "• • • the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions."

Section 77(d) prescribes only that the plan approved by the Commission must "meet with the requirements of subsections (b) and (e) of this section" and also be "compatible with the public interest". We have already referred to subsection (b). We refer later to subsection (e).

Counsel for the St. Joe Paper Company say most explicitly that Section 77 *expressly denies* the Commission the power to approve a plan which provides for a merger unless there be an advance consent. The Paper Company brief uses the words "expressly denied" (p. 17), "denies" (p. 18) and "denied" (p. 18). Its Point I concludes with this categorical assertion (p. 21):

> "The denial to the Commission of power to bring about mergers without consent of the carriers is absolute and unconditional."

Similarly the Seaboard-Southern brief uses the words "deny" and "denied" (p. 21, heading).

But the argument that Section 77 "expressly denies" the Commission the power to approve a plan which has not been consented to in advance finds no support whatever in the two subsections of Section 77 which deal directly with the approval of a plan by the Commission, subsections (b) and (d); and, as shown below, no other subsection denies the Commission such a power.

After repeatedly saying that the Commission may not approve a merger plan "without the consent of the carriers" (p. 16, 17, 18, etc.), counsel for the St. Joe Paper Company further imply most distinctly that in this case, since the Commission held the Debtor's stock to be without value, it was necessary to get the consent of the "5% bondholders" because they are "the equitable owners of the property" (p. 20). Neither subsection (d) nor any other subsection says or suggests anything about getting the consent of the "equitable owners of the property".

The St. Joe Paper Company's brief does not go into any detail about the time when any "consent of the carriers" or of the "equitable owners of the property" must be obtained. But their discussion of the "cram-down" provision is squarely based on the proposition that a plan cannot be submitted to the Court for approval, submitted to the stockholders for a vote or confirmed unless in the first place the Commission had the "consent of the carriers" or of the "equitable owners of the property" *before the Commission approved the plan* (p. 18-19). There is literally nothing in Section 77(d) or any preceding subsection (nor, as we show later, in any succeeding subsection) which affords the slightest basis for this contention. We discuss elsewhere what it would mean to adopt the petitioners' theory.

Approval of a plan by the Court.

The provisions of Section 77 with respect to the approval of a plan by the Court, which are rather long, are

quoted in Appendix A (p. 2-4). They were definitively construed by this Court in *Ecker* v. *Western Pacific Railroad Corp.* (1943) 318 U. S. 448 and *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943) 318 U. S. 523. They contain the requirement that the Court find that the plan is "fair and equitable", and the reference in subsection (d) to subsection (e), which we have quoted above in connection with the approval of a plan by the Commission, necessitates a prior finding by the Commission that a plan is "fair and equitable".

However, the provisions relating to the approval of a plan by the Court contain no references to consents, assents, mergers, consolidations or transfers. No argument has been advanced which relates particularly to any of them and no further mention of them seems necessary.

Confirmation of a plan—the "cram-down" provision.

Section 77(e) provides for the submission of an approved plan for a vote and a certification of the results of the submission to the District Court by the Commission. It then provides (italics supplied)

> "Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the*

> *plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interest or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):* * * *."

The proviso, which was added when Section 77 was amended in 1935, is known as the "cram-down provision."

The "cram-down provision" was construed by this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495, 531-535. The gist of the decision was that if a class of creditors votes against the plan there should be a re-examination of their treatment but that "the reexamination of this treatment does not differ from that for the original court approval", and that changed conditions may justify an adverse vote, but that (p. 535):

> "If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection.

It will be observed that the cram-down provision applies explicitly to *any* plan of reorganization. The language is just as comprehensive as that of subsection (d) relating to the approval of the plan by the Commission and that of subsection (e) relating to the approval of the plan by the Court. *No distinction is made between a plan which provides for a merger, consolidation or transfer of the debtor's assets and one which does not.*

The respondent's argument has been and is that under the cram-down provision the Court could and should override the opposition of the St. Joe Paper Company and the

other opponents of the plan in this case, if they continue to oppose it, unless there be one of the justifications for an adverse vote which were mentioned in the *Denver & Rio Grande* case. The cram-down provision authorizes a "forced merger" in that sense, because there would then be a transfer of the assets of the Florida East Coast over the objection of the holder of a majority in amount of the First and Refunding Mortgage Bonds.

Counsel for the petitioners attempt to dispose of the cram-down provision on three grounds:

They say that the cram-down provision relates "only to the power of the court, not the Commission"; and they imply that the question here is whether the Commission can cram down a plan (St. Joe Paper Company brief, p. 18; see also Southern-Seaboard brief, p. 25 and R. L. E. A. brief, p. 23-24). This most curious argument implies that the respondent contends that Section 77 gives "the Commission power to force a merger" (p. 18). *The respondent has never contended that the Commission, by itself, has the "power to force a merger"; indeed, the respondent has never contended, and it is not the fact, that the Commission, by itself, can put through any kind of a plan of reorganization.* However, the Commission does have the power to approve a plan and the question before this Court is whether the Commission has the power to approve a plan which provides for a merger even though St. Joe Paper Company opposes the plan. After approval it will be necessary to have a confirmation of the plan before it can be carried out. *It has been, and is, the respondent's contention that the Commission had the power to approve the Plan over the objection of the St. Joe Paper Company and that the Court will have the power to confirm the Plan. Thus the Plan will be put through by the exercise of the combined powers of the Commission and the Court.*

This Court said in *Palmer* v. *Massachusetts* (1939) 308 U. S. 79, 87:

"The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission."

The *Denver & Rio Grande* case establishes that if the Commission approves a plan and its approval is sustained by the Court, then the Court should confirm the plan, even if there be an adverse vote, except in one of the two contingencies referred to in the *Denver & Rio Grande* case. Even before the cram-down provision was adopted the Commission was authorized to approve a plan that was opposed by a majority in amount of a class of bondholders, but until the cram-down provision was enacted there was always a very grave risk that such a plan would be defeated—the only thing that could save it was a change of position on the part of the bondholders or a change in the ownership of bonds. After the enactment of the cram-down provision, and particularly after this Court's opinion in the *Denver & Rio Grande* case, the Commission has not needed to concern itself so much about threats of adverse votes.

The petitioners also contend that there can never be any opportunity to resort to the cram-down provision unless a plan has been validly approved by the Commission and that the Commission cannot validly approve a plan for a merger or consolidation or transfer of assets unless it has had the *prior* "consent of the carriers" or of the "equitable owners of the property" (St. Joe Paper Company brief, p. 18). We have noted above that there is nothing in Section 77 to sustain this argument.

Their third contention is that "the legislative history hereinafter disclosed confirms the view that the cram-down power of the court was designed only to prevent disruption of a plan, otherwise valid and acceptable, by part or all of a class of security holders seeking to blackmail their way into a preferred position" (St. Joe Paper Company brief, p. 18-19; see also Seaboard-Southern brief, p. 27 and R. L. E. A. brief, p. 22-29). This contention is devel-

oped separately in the briefs (St. Joe Paper Company brief, p. 28-29; Seaboard-Southern brief, p. 53-62 and R. L. E. A. brief, p. 22-29) and we refer to it separately below (p. 127-140). The proposition for which counsel for the petitioners contend is that under the cram-down provision the Court should not override dissents by a large number of classes of creditors or a strong dissent by a single large class. That proposition has no conceivable relation to the question whether the Commission has the power to approve a "merger plan" without obtaining an advance consent or consents. Indeed, it has nothing to do with the subject of "mergers" or "consolidations" at all. If the proposition were sound, it would apply to any plan whether or not the plan provided for a merger, consolidation or transfer of the debtor's assets.

The execution or consummation of the Plan—the consistency clause.

Subsection (f) of Section 77, which consists of a single paragraph, deals with the execution or consummation of the plan after it has been confirmed. The fifth sentence of subsection (f) reads (italics supplied):

> "Upon confirmation of a plan, the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and *not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.*"

This is the "consistency clause" on which the petitioners rely. Chapter 1 of Title 49 is the Interstate Commerce Act.

This sentence of subsection (f) was christened the "consistency clause" by counsel for one of the petitioners in

this case. The name seems reasonably descriptive but has no special significance.

Needless to say, on its face the consistency clause does not bar the Commission from approving any kind of a plan because there has not been an advance consent by the debtor, its stockholders or creditors.

The petitioners rely on the words "not inconsistent with the provisions and purposes". They say that it was "inconsistent with the provisions and purposes" of the Interstate Commerce Act for the Commission to approve the Plan in this case without the consent of the St. Joe Paper Company.

We therefore look to see on what provisions of the Interstate Commerce Act they rely. Counsel for the St. Joe Paper Company cite Section 5(2)(a)(i) and Section 5(2)(b) (p. 5-6). Counsel for the Seaboard-Southern seem to rely on Section 1(18) and Section 5(2)(i), (b), (c), (d) and (f) (p. 2-5). The brief of the Railway Labor Executives Association merely refers to the statutes cited in the other briefs (p. 2).*

Section 1(18) covers extensions and abandonments of lines and can be disregarded.

We look therefore to Section 5(2), all of which is quoted in Appendix A hereto (p. v-viii).

The correct interpretation of the "consistency clause".

An examination of Section 5(2) readily indicates what the Congress had in mind in enacting the consistency clause. Section 5(2)(b) provides that the Commission shall approve a transaction covered by Section 5(2)(a) only if the transaction will be "consistent with the public

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* Counsel in No. 37 also cite Section 5(11) (p. 48). That is also quoted in Appendix A hereto (p. ix). We discuss it in our brief in No. 37 but not in this brief because the petitioners' counsel do not discuss it.

interest". This provision is implemented by Section 5(2)(c) which provides:

> "(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

In the first place, the consistency clause operates as a guide for use by the Commission in determining whether a plan is "compatible with the public interest". The clause was so construed by the Commission long before the novel, ingenious and untenable interpretation of the clause on which the petitioners now rely was first advanced in January, 1948. In the Commission's Third Supplemental Report dated April 8, 1947, the Commission said (267 I. C. C. 301-302):

> "Section 77 of the Bankruptcy Act provides that a plan of reorganization shall not be inconsistent with the provisions and purposes of the Interstate Commerce Act, but does not specify that the same procedure must be followed. To insure conformity with the provisions of subsection (f) of section 77, the record of a reorganization proceeding involving the question of an acquisition of the properties of a debtor by another carrier or by a noncarrier company which already controls a carrier, (but, on the present record of this case only to the extent as hereinafter shown to be necessary), should be sufficient to enable us, in approving a plan, to make the findings required under the Interstate Commerce Act with respect to such an acquisition."

In the second place, the consistency clause enables the Commission to assure itself that during the period after the Commission's approval of the plan it has not become inconsistent with the public interest as a result of some intervening development. The enumeration of the four factors in Section 5(2)(c) is not all-inclusive; Section 5(2)(c) also uses the words "among others". Something might happen after the approval of a plan which would make the plan clearly inconsistent with the public interest, in which event the Commission could refuse to grant the authority provided for in the consistency clause.

The brief of the Railway Labor Executives' Association says that this interpretation of the "consistency clause" was advanced for the first time in respondent's brief in opposition to certiorari (p. 11). Not at all. It was made in detail in the respondent's brief in the Court of Appeals in 1949,* on the appeal from Judge SIBLEY's order; that was the first occasion when counsel for the respondent thought that there was any occasion to discuss the "consistency clause".

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* Several pages of the Atlantic Coast Line's main brief of July 12, 1949 were devoted to establishing that the purpose of the "consistency clause" was to insure consistency in respect to matters affecting the public interest. Among other things the brief said (p. 103):

> "The appellees' contention confuses the functions of the Interstate Commerce Act and Section 77. The merger provisions of the Interstate Commerce Act were designed to control mergers in the public interest, i.e., to see that no mergers were carried out unless they were found to be 'consistent with the public interest.'"

The point was covered again in Atlantic Coast Line's reply brief of September 28, 1949 (p. 59-66) and the following argument was made in italics (p. 61):

> *"The simplest way for the Congress to make sure that a plan could not be consummated under Section 77 which was 'inconsistent with the provisions and purposes of the Interstate Commerce Act' relating to the public interest was to insert the 'consistency clause' and that is what Congress did."*

The petitioners' contentions as to the construction of the consistency clause.

The petitioners' contention is, and must be, that the "provisions and purposes" of Section 5(2) are such as to make it unlawful for the Commission in a Section 77 proceeding to approve a plan of reorganization that provides for the transfer of the properties of the debtor to another corporation—even within the same "system" or to another debtor in the same proceeding—unless the Commission has obtained an advance consent from the debtor corporation or, if the stock of the debtor is going to be held to be without value, then from a majority in amount of some class or classes of bondholders.

There is certainly no "provision" of Section 5(2) which could possibly be said to have any such meaning. The Southern-Seaboard stress the word "purposes", which they evidently believe to be broader than "provisions" (p. 22).

To sustain the conclusion which the petitioners reach it must be said that one of the affirmative purposes of Section 5(2) is to *prohibit* a transfer of the assets of a debtor in a Section 77 proceeding to another corporation, even within the same "system" or to another debtor in the same proceeding, unless there be a prior consent by the debtor corporation or, if the stock of the debtor may be without value, then by a majority in amount of some class or classes of bondholders. However, as the Commission pointed out (267 I. C. C. 732), there is nothing in Section 5(2) that even suggests that that is one of its purposes.

Section 5(2) deals generally with mergers, consolidations and other forms of unification. It applies to *solvent* carriers and recourse is, of course, had to it far more often in the case of solvent carriers than in the case of bankrupt carriers. It does not purport either to protect or to impinge upon the private rights and interests of stockholders

or bondholders except to the limited extent to which Section 5(11) deals with stockholders of solvent corporations, a point to which counsel for the petitioners do not refer.*

Section 77 of the Bankruptcy Act deals with bankrupt carriers. One of its principal purposes is to modify private rights and interests of stockholders, bondholders and other creditors. It authorizes plans of reorganizations which provide for mergers, consolidations and other forms of unification and its provisions affecting the private rights and interests of stockholders and bondholders apply to all types of plans.

The petitioners' briefs fail to distinguish between the *public interest aspects* of a unification of two carriers and what may be called the *private interest aspects.* They also fail to distinguish between the rights of *bondholders of an insolvent carrier* and the rights of *stockholders of a solvent carrier.*

It is clear that the consistency clause in Section 77 as revised in 1935 and the predecessor clauses in the original 1933 Act were intended *only* to make sure that, in deciding what would be "compatible with the public interest" with respect to a Section 77 plan providing for a unification of two or more railroads, the Commission's decision would not be inconsistent with the decision it would make as to such *public interest aspects* if the unification were before it on a Section 5 application.

While Section 77 and Section 5 of the Interstate Commerce Act are linked together, through the "consistency clause", to the extent that is necessary to insure consistency in *public interest aspects* of a unification, they have separate fields as to *private interest aspects.* Section 77 governs the treatment of bondholders of a debtor in a Section 77 proceeding. Section 5 governs as to stockholders of a solvent corporation to the extent prescribed

* As already stated, that subject is discussed in the respondent's brief in No. 37 (p. 34-35).

in Section 5(11). Otherwise state laws determine the rights of stockholders and creditors.

The distinction can be pointed up by a quotation from Justice FRANKFURTER's dissent in *Schwabacher v. United States* (334 U. S. 182 at p. 206):

> "The Commission was charged with seeing to it that the very limited requirements of § 5 (2) were observed, and to that end was given 'exclusive and plenary' authority. § 5 (11). The purpose was to authorize a voluntary arrangement, to sanction an agreement, not to formulate a plan and to coerce its adoption, as is true of § 77. The law specifically enumerates the requirements that constitute the 'public interest' which the voluntary agreement must satisfy to secure the Commission's approval. These are: the effect of the proposal on the public transportation service; the effect of including or failing to include other railroads in the plan; the resulting fixed charges; and the interest of the carrier employees affected. • • • The great difference between these requirements and the detailed and comprehensive provisions of § 77, 11 U. S. C. § 205, carries a sharp legal contrast between the authorization which Congress required for voluntary mergers and the coercion of an imposed plan of reorganization in the case of insolvent roads."

While this quotation is from a dissenting opinion, all will agree that there are vast differences between the sanctions imposed by Section 77 against creditors and stockholders and any imposed by Section 5 against dissenting stockholders.

The Commission's statements were clear (267 I. C. C. 731-732):

> "The language used in subsection (f) is 'not inconsistent with.' The approved merger plan is not inconsistent with the Interstate Commerce Act. There is no prohibition in the Interstate Commerce Act against the merger of an insolvent railroad with

> a solvent railroad. We may, pursuant to our power under Section 77 of the Bankruptcy Act to deal with bankrupt railroads, promulgate a plan which provides that the bankrupt shall be merged with a solvent corporation, and the court which has jurisdiction of the bankrupt's property may confirm the plan. The solvent corporation here is willing. There is nothing in the Interstate Commerce Act to prohibit us from approving such a transaction."

The petitioners' arguments lack even technical support in Section 5(2). They imply repeatedly that if there is to be a transfer of assets it is necessary to have initiative, or at least consent, on the part of the transferor. They are definitely mistaken about that. *Authority must be sought under Section 5(2)(b) by the carrier which is purchasing the assets to be transferred, but it is neither necessary nor proper for the transferor to apply.*•

Hence, if the Florida East Coast Railway Company were solvent, it would not be necessary for the Railway Company or any of its bondholders or stockholders to consent before the Commission could grant authority to the Atlantic Coast Line to acquire the properties of the Florida East Coast. The Atlantic Coast Line could apply for authority under Section 5(2) and the Commission could grant the authority without any consent by the Florida East Railway Company, its stockholders, bondholders or other

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• Thus in *Erie Railroad Company Purchase* (1943) 254 I. C. C. 486, when an application was filed by Erie Railroad Company for authority to purchase the properties of The New York and Greenwood Lake Railway Company, The Caldwell Railway Company and The Roseland Railway Company, and applications were filed by the three latter companies for authority to sell their properties to Erie Railroad Company, the Commission granted the application of the Erie Railroad Company and dismissed the other applications. The Commission said (p. 490):

> "We are of the opinion that the statute does not require the vendor to seek our approval of the sale, and therefore any authorization we grant should be directed or limited to the Erie".

creditors. Of course, the transfer could not be carried out unless and until there were properly authorized action by and on behalf of the transferor and its stockholders to the extent required by state law. But the point is that state law governs the solvent transferor's stockholders, bondholders and other creditors except to the limited extent provided by Section 5(11). The purpose of Section 5(2) is to protect the public interest.

The "provisions and purposes" of the Interstate Commerce Act are to be determined by what is *in* the Act. The appellees argue, in effect, that the "provisions and purposes" of the Interstate Commerce Act are not to be determined by what is *in* the act, but are to be determined by what is *absent* from the Act. Because the Interstate Commerce Act, which relates to all railroad corporations (including solvent ones), lacks any provision for any compulsion of carriers or their stockholders, they say that to make use of compulsion against bondholders in a Section 77 proceeding, in the case of an insolvent railroad corporation, is inconsistent with the "provisions and purposes" of the Interstate Commerce Act. The Commission answered this contention succinctly (267 I. C. C. 731):

> "The Interstate Commerce Act deals with solvent carriers and contains no machinery for dealing with bankrupts. Its 'provisions and purposes' are not directed to the rehabilitation of insolvent railroads. To hold that our powers under the Bankruptcy Act to promulgate a plan of reorganization for a debtor corporation are subordinate to our powers under the Interstate Commerce Act would defeat the bankruptcy statute."

Summary as to the construction of Section 77 and Section 5 of the Interstate Commerce Act.

When one looks at the explicit provisions of Section 77 and then analyzes the arguments advanced by the petitioners, it becomes evident that there is no basis for any

substantial issue as to the legality of the Commission's action in approving the Plan in this case.

The Plan falls unmistakably within the terms of subsection (b) of Section 77. The provisions of subsection (d) and (e) which relate to the approval of a plan by the Commission and by the Court apply without reservation or qualification to any plan which falls within the terms in subsection (b). The same thing is true of the cram-down provision of subsection (e).

The petitioners' entire argument rests on the "consistency clause" of subsection (f), which provides that authority to execute a plan shall be granted only to an extent "not inconsistent with the provisions and purposes" of the Interstate Commerce Act. The petitioners say that it is "inconsistent with the provisions and purposes" of Section 5(2) of the Interstate Commerce Act for the Commission to approve a plan of reorganization that provides for a merger, consolidation or transfer of the assets of the debtor unless prior to the approval of the plan by the Commission there be a consent, if the Commission is going to hold that the stock is without value, of a majority in amount of such bondholders as may be the "equitable owners" of the debtor's property—or of a large part of the debtor's property.

But there is no reference anywhere in Section 5(2) to consents of bondholders or "equitable owners". There is not even any requirement in Section 5(2) for initiative or consent on the part of the transferor or its stockholders in the case of a transfer by a solvent carrier. Moreover, it is a primary purpose of Section 77 to deal with private rights of debtor corporations, their stockholders, bondholders and other creditors and the primary purpose of the Interstate Commerce Act is to protect the public interest. Section 77 and Section 5(2) should be applied consistently, but consistency does not require that the Commission or the Court should be deprived of powers which are expressly

granted to them by Section 77 merely because the same powers are not granted to them by the Interstate Commerce Act.

The petitioners' briefs fail to quote any part of subsection (b), subsection (d) or subsection (e) of Section 77 except the cram-down provision of subsection (e). At the same time their briefs contain such statements as that Section 77 "*expressly denied* to the Commission power to certify a plan which called for a merger without the consent of the carriers" (St. Joe Paper Company brief p. 17). Only by disregarding the actual provisions of the controlling statute, Section 77, can a plausible argument be built up.

III.

Under Section 77 the trustee or trustees of a debtor have title to all of the assets of the debtor and can transfer the assets of the debtor pursuant to an order of the Court which carries out a plan of reorganization. To that extent the trustees act for the debtor.

Section 77 does not contemplate any other consent, assent, initiative or act on the part of the Debtor in this case.

The bondholders have not as "equitable owners of the property" taken "the place formerly held by its stockholders" with respect to mergers, consolidations and transfers of assets.

Under the fifth sentence of clause (2) of subsection (c) of Section 77, trustees of a debtor "have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all the powers of a trustee appointed" in an ordinary bankruptcy. In carrying out a Section 77 plan of reorganization, under which the assets of the debtor are to be transferred to another railroad corporation, the trustees can execute deeds and other instruments of transfer and may be required to do so by the Court. Where, as in this instance, the equity

of the stockholders of the debtor is held to be without value, Section 77 obviously does not contemplate any other consent, assent or initiative on the part of the debtor, which is a mere corporate shell.

It is unnecessary to consider whether complications would arise if an effort were made to carry out the Plan in this case by a technical merger or consolidation rather than by transfer of the Debtor's assets, because the Plan expressly authorizes a transfer and conveyance of the assets by the Debtor's Trustees (282 I. C. C. 213).

In asserting that the bondholders must consent to a transfer of the Debtor's assets to the Atlantic Coast Line the St. Joe Paper Company brief says (p. 20):

> "The Commission's conclusion that the bondholders are the equitable owners of the property, taking the place formerly held by its stockholders, is supported by the decisions of this Court. See *Helvering* v. *Cement Investors*, 316 U. S. 527; *Helvering* v. *Alabama Asphaltic Limestone Co.*, 315 U. S. 179, 183-4."

The Commission did not find that "the bondholders are the equitable owners of *the* property". Nor did the Commission find that the bondholders have taken "the place formerly held by its stockholders". The Commission found (282 I. C. C. 186, italics supplied):

> "Pursuant to the request of St. Joe Company, we declare that on the basis of the record the holders of the debtor's first and refunding mortgage bonds are, prior to reorganization of the debtor, *equitable owners of the assets mortgaged to secure the bonds.*"

As we have pointed out elsewhere, *the* property of the Debtor includes unmortgaged assets worth in excess of $1,000,000 (281 I. C. C. 176-181). And the Commission made no finding about the place formerly held by the stockholders.

Nor do *Cement Investors* and *Alabama Asphaltic Limestone Co.* support the proposition that the bondholders have taken the place formerly held by the stockholders with respect to mergers, consolidations and transfers. In the respondent's brief in No. 37 at pages 29-33 we have discussed those two decisions and also *Helvering* v. *Southwest Consolidated Corp.* (1942) 315 U. S. 194.

Neither of the two cases which are cited in the St. Joe Paper Company brief involved the question whether as "equitable owners" of a debtor's property bondholders had succeeded to statutory rights of stockholders. On the other hand, *Southwest Consolidated Corp.* indicates that bondholders cannot be deemed stockholders for the purpose of a statute which refers to stockholders *eo nomine* until they become such. In view of this Court's decisions and for the reasons which we have set forth more fully in the respondent's brief in No. 37, there can be no doubt that the bondholders in this case have not taken "the place formerly held by" the debtor's stockholders with respect to mergers, consolidations and transfers of assets.

IV.

In May, 1945, counsel for the St. Joe Paper Company expressed the opinion before the Commission that a "forced merger" would be legal. The petitioners did not develop any theories about the "consistency clause" and legislative history until January, 1946, after the proceedings involving a proposed "merger plan" over the objection of the St. Joe Paper Company had been going on for well over two years. The theory propounded before Judge Sibley, in the Court of Appeals and in the petition for certiorari in this Court has undergone marked changes.

On May 29, 1945, counsel for the St. Joe Paper Company expressed the following opinion (see p. 28-29 above):

> "That under the fifth provision of paragraph E* of the Act, the Commission could sell the property of

* This is an obvious typographical error for paragraph (b).

> the bankrupt to another railroad company for securities of that railroad company, and compel the holders of the present securities to accept those securities."

The Atlantic Coast Line had been permitted to intervene in this case in the latter part of 1944. After the oral argument on May 29, 1945, from which we have quoted above, the proceedings were reopened and in October, 1945 the Atlantic Coast Line filed its first proposed "merger plan". In the period between October, 1945 and January 8, 1948, when the theories about the "consistency clause" and legislative history were first expounded, there were long hearings before Examiners, briefs filed with the Examiners, a proposed report, exceptions to the proposed report, briefs, reply briefs, oral argument before the full Commission, a report by the Commission, petitions for modifications, briefs in support of the petitions and answering briefs. During all these steps over more than two years the theory on which the petitioners now rely never emerged.

As we have noted above at pages 6-7, the arguments which persuaded Judge SMILEY in January, 1949, were based on legislative history and the theory that the consistency clause "became accidentally misplaced in redrafting the Act". The petitioners cite no instance, and we remember none, where they contended prior to the present briefs that Section 77 and Section 5 of the Interstate Commerce Act could be construed on their face as supporting the petitioners' contentions. Their reliance has been on legislative history and the supposition about the accidental misplacement of the clause which was in the original 1933 Act. Any arguments about accidental misplacements were certainly greatly weakened, if not demolished, by this Court's decision in *Unexcelled Chemical Corp.* v. *United States* (1953) 345 U. S. 59, to which we referred above at page 8. Now the petitioners no longer contend that there was a misplacement of the consistency clause.

Surely if Section 77 and Section 5 of the Interstate Commerce Act were susceptible of the construction now put upon them by the petitioners, the able and experienced counsel who represented the St. Joe Paper Company and the two railroads over the years 1945-1952 would have discovered that such was the case.

V.

The construction which the plain language of Section 77 commands is supported by strong and persuasive considerations as well as by the phraseology of the statute:

(1) The construction gives due weight to the public interest.

(2) It is in accord with the Congressional policy which favors the unification of weak railroads with strong railroads.

(3) It is consistent with the underlying philosophy of this Court's decisions as to disposition of trust assets and the respective rights of majorities and minorities.

The petitioners' fundamental proposition is, and must be, that the St. Joe Paper Company has the power to block *any* merger plan of reorganization no matter how favorable it be to the public or to the minority bondholders, simply by announcing to the Commission that it is opposed to any plan for a unification of the Florida East Coast and the Atlantic Coast Line. The petitioners' theory is that any such announcement will prevent the Commission from even considering the possibility of a unification of the two railroads.

While the provisions of Section 77 are sufficient to dispose of the petitioners' theory, it may not be amiss to point out briefly the relationship of a correct construction of Section 77 to certain aspects of a railroad reorganization.

(1) *The respondent's construction gives due weight to the public interest.*

This Court said in *Ecker* v. *Western Pacific Railroad Corp.* (1943) 318 U. S. 448, 468:

> "These reorganizations require something more than contests between adversary interests to produce plans which are fair and in the public interest. When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest. Congress outlines the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the Court."

With respect to control, the same opinion said, referring to the 1935 revision of Section 77 (p. 471):

> "The Senate Report, No. 1336, 74th Cong., 1st Sess., concluded:
>
> "The amendments to section 77 leave unimpaired the power and the duty of the commission and the courts to deal with the most important feature of all reorganization plans, that of the control of the reorganized company; and similarly the commission and courts will continue to have the power and authority of making that thorough investigation which is necessary to assure sound and reliable control for bankrupt companies when they emerge from the courts, in place of the type of control under which some railroads have been wrecked."

The respondent's construction of the statute gives due weight to the public interest factor. The petitioners' does not.

The petitioners insist, in effect, that the St. Joe Paper Company should have a dominant position simply because it bought a majority in amount of the First and Refunding Mortgage Bonds during the reorganization proceeding.

The practical effect on the public interest of according to a majority bondholder such a dominant position as the St. Joe Paper Company demands is brought into sharp focus by considering the alternative equity plan, which the St. Joe Paper Company sponsors, and the St. Joe Paper Company's demand that the Section 77 proceeding be dismissed so that the alternative equity plan can be carried out in equity. We have summarized the gross defects of that plan above at pages 40-43 and we refer to it again at pages 145-148 below.

(2) The respondent's construction is in accord with the Congressional policy which favors the unification of weak railroads with strong railroads.

The policy of the Congress since the enactment of the Transportation Act of 1920 has been to further the unification—commonly called "consolidation"—of non-competing carriers. That Congressional policy, which from the time of the passage of the Transportation Act of 1920 until the passage of the Transportation Act of 1940 contemplated an "ambitious nation-wide plan of consolidation", was modified by the Transportation Act of 1940 so as to further instead step-by-step unifications. The development of Congressional policy, as thus briefly summarized, is set forth in detail in Justice JACKSON's opinion for the Court in *Schwabacher* v. *United States* (1948) 334 U. S. 182, 192-194.

One of the principal objectives of Congressional policy, as the Interstate Commerce Commission recognized in *Nickel Plate Unification* (1926) 105 I. C. C. 425, 449, has been "the union of the weak with the strong." Obviously there is no more suitable occasion for "the union of the

weak with the strong" than the reorganization of a debtor which has been unable to meet its obligations.

Since railroad reorganizations deal with the "weak", it would have been strange if Section 77 as originally enacted on March 3, 1933 and as revised on August 27, 1935 had not contained provisions to further the Congressional policy of encouraging unifications. Congress must have foreseen that in some reorganizations the two principal objectives of Section 77 could be served by a unification of the debtor with an "outsider" railroad corporation. The public interest would be served "by the union of the weak with the strong". The private interests of security holders would be served because they could receive better treatment.

There is no reason to suppose that, when the Congress enacted the "cram-down" provision in 1935 to remove the "blockade"* which adverse votes of bondholders might otherwise interpose, the Congress had the slightest intention of distinguishing between plans of reorganization which provided for mergers and those which did not.

And the unwillingness of the Congress to sanction a general program for the "forced merger" or "compulsory consolidation" of solvent railroads under the Interstate Commerce Act has no tendency to establish that Congress has not consistently favored the unification of bankrupt railroads and strong, solvent railroads.

(3) The petitioners' construction is inconsistent with the underlying philosophy of this Court's decisions on the disposition of trust assets and the respective rights of majorities and minorities.

In the respondent's brief in No. 36 at pages 18-23 we have brought out that the petitioners all stand on the proposition that the holder of a majority in amount of a class of bonds such as the First and Refunding Mortgage

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* *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495, 534.

Bonds in this case has the right to block any plan of reorganization other than one for an internal reorganization under which the majority bondholder would receive a majority stock interest in a new or reorganized company. We have shown that that proposition conflicts with the basic philosophy of a long line of decisions of this Court which accord greater weight to administrative and judicial determinations of fairness and less weight to the demands or preferences of a majority security holder.

And we have pointed out that the St. Joe Paper Company's insistence on an internal reorganization in which it will hold at least a majority of the stock of the new company is not significantly different from a demand of a holder of a majority beneficiary interest in a trust that the assets of the trust be sold to the majority holder at a price less favorable than could be obtained by a sale to someone else.

Apparently when the St. Joe Paper Company bought a majority in amount of the First and Refunding Mortgage Bonds it thought that thus it became sure of having a majority stock interest in a new or reorganized Florida East Coast. However, the purchase of a majority in amount of a class of mortgage bonds of a railroad which is a debtor in a Section 77 proceeding is not the same thing as the purchase of a majority stock interest in a solvent railroad corporation, and a purchaser of such an amount of bonds does not become automatically entitled to a controlling stock interest in a new or reorganized railroad company. Section 77 commands that consideration be given and determinations be made not only with respect to the public interest but also with respect to the interests of each *class* of creditors—that is to say, the interests of all members of each class, not merely majority members. In our discussion at pages 18-23 of the respondent's brief in No. 36 we have brought out how solicitous this Court has been not only of the public interest but of the interests of minorities.

VI.

All of the petitioners' arguments would apply to "mergers" within a railroad system, or to a "merger" of two or more debtors, if they were valid as to a transfer of assets from a debtor to a so-called "outsider".

If the petitioners' construction of Section 77 were sound, it would follow that many plans of reorganization have been illegally approved, confirmed and consummated.

It would also follow that great advantages of Section 77 reorganization procedure would be lost.

With respect to force or compulsion—the consummation of a plan over the objection of the holders of a majority in amount of a class of mortgage bonds—there is no important difference between many intra-system mergers or mergers of debtors, on the one hand, and a transfer of assets from a debtor to a so-called "outsider" on the other.

One of the outstanding things about railroad reorganizations under Section 77 of the Bankruptcy Act is the extent to which unifications have been effected within railroad systems through reorganization plans. If the petitioners' theory were sound, many such unifications would have been impossible.

Judge SIBLEY said (V, 479; 81 F. Supp. 933-934):

> "This case is not as though the merging corporations were affiliates, and members of the same corporate family already. In such a case there is really a mere simplification of corporate organization of interests already related."

The distinction made by Judge SIBLEY is not permissible under the petitioners' theory. If the "provisions and purposes" of the Interstate Commerce Act barred forced mergers, those "provisions and purposes" would bar "forced mergers" of "affiliates" or members of the same "corporate family" or "system". For the Interstate

Commerce Act applies to such mergers as well as to mergers of "stranger" railroad corporations.*

Old Colony Bondholders v. *New York, N. H. & H. R. Co.* (C. C. A. 2, 1947) 161 F. 2d 413, cert. den. *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & Hartford Railroad Co.* (1947) 331 U. S. 858, rehearing denied (1947) 332 U. S. 803, affords an example of a "forced merger", in the sense in which that term has been used by the petitioners, that was effected by authority of Section 77. By the reorganization all of the assets of Old Colony Railroad Company were transferred to the reorganized New York, New Haven & Hartford Railroad Company despite the adverse vote of a majority in amount (of those voting) of the holders of the mortgage bonds of the Old Colony. As the stock of the Old Colony was held to be without value, the holders of the mortgage bonds were just as much the "equitable owners" of the Old Colony's property as the holders of the First and Refunding Mortgage Bonds can be said to be the "equitable owners" of the properties of the Florida East Coast.

The R. L. E. A. brief challenges this precedent on two grounds (p. 31):

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* Section 5 has consistently been construed to apply to mergers of corporations which are already "affiliates" and members of the same "corporate family" and the same "system". See as an example *Schwabacher* v. *United States* (1948) 334 U. S. 182. The following other examples of "intra-system" mergers passed upon under Section 5(2) of the Interstate Commerce Act in recent years were cited in the brief which we filed in the Court of Appeals in 1949: *Cleveland, C. C. & St. L. Ry. Co. Merger*, 228 I. C. C. 240 (1938); *Toledo & O. C. Ry. Co. Merger*, 228 I. C. C. 433 (1938); *Elgin, J. & E. Ry. Co. Merger*, 230 I. C. C. 431 (1938); *Atchison, T. & S. F. Ry. Co. Merger*, 254 I. C. C. 159 (1942); *Kansas City S Ry. Co. Merger*, 254 I. C. C. 529 (1942); *Delaware, L. & W. R. Co. Merger*, 257 I. C. C. 91 (1944); *Delaware & H. R. Corp. Merger*, 257 I. C. C. 453 (1944); *Chicago & Northwestern Railway Co. et al Merger*, 261 I. C. C. 672 (1946); *Pere Marquette Railway Co. Merger*, 267 I. C. C. 207 (1947). The instances since 1949 have been too numerous to mention.

It says first that the "adverse votes (p. 31) of [Old Colony] bondholders were not directed at the fact of acquisition by the New Haven but were directed at the question of price" and it cites *Old Colony Bondholders* v. *New York, New Haven & Hartford Railroad Co.* (C. C. A. 2, 1947) 161 F. 2d 413, 417. On a Section 77 submission bondholders simply sign ballots saying "accept" or "reject". All that is shown at 161 F. 2d 417 is that the Committee of the Old Colony Bonds "requested the Commission to hold further hearings and to reconsider its findings with respect to the price".

The second ground of attempted distinction is that there was no practical alternative to the merger of the Old Colony and the New Haven. It is unnecessary to consider what the record shows as to the feasibility of separate operation of the Old Colony, because the petitioners' argument is that under Section 77 there is a complete lack of *power*. If their argument were sound, it would be immaterial whether a "merger plan" is absolutely necessary as a practical matter, relatively very desirable or merely somewhat advantageous.

Reconstruction Finance Corporation v. *Denver & Rio Grande Western Railroad Company* (1946) 328 U. S. 495, effected a "forced merger" of the Denver & Rio Grande and The Denver & Salt Lake Railway Company, referred to in this Court's opinion as "the Salt Lake", despite an adverse vote of the holders of the General Mortgage Bonds of the Denver & Rio Grande. The position of the holders of General Mortgage Bonds of the Denver & Rio Grande was substantially similar to the position of the holders of the First and Refunding Mortgage Bonds of the Florida East Coast, i.e., theirs

was the large junior issue and they could reasonably be referred to as the "equitable owners" of the Denver & Rio Grande. They voted to reject the plan "by a vote of 20.67% for to 79.33% against the plan".[1] The plan was carried out by forming a new Delaware corporation, to which all of the properties embraced in the plan were transferred. The result was precisely the same as if a new Atlantic Coast Line *Railway* Company were organized and the properties of the Florida East Coast Railway Company and the Atlantic Coast Line Railroad Company were transferred to it.

The Denver & Rio Grande plan would perhaps not be thought of immediately as involving a "forced merger" because the vote against the plan was cast by a majority in amount of the holders of a class of bonds of the *larger* corporation involved in the unification, and also because there was no argument against the merger feature of the plan on the part of the opposing class. But these factors are without significance in relation to the petitioners' theory, which would have barred a merger of the Denver & Rio Grande and the Denver & Salt Lake over the objection of the Denver & Rio Grande bondholders—or, to be more exact, in the absence of an advance consent of the "equitable owners" of the Denver & Rio Grande.

The reorganization of *Central of Georgia Railway Company* involved a "forced merger", although no appeal was taken from the order of confirmation. It affected no less than six classes of mortgage bondholders who failed to cast the statutory two-thirds vote in favor of the plan. Four classes voted to reject the plan, the adverse percentage being 100% in the case of one small class. The holders of the Consolidated Mortgage Bonds, the most important

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[1] *In re Denver & R. G. W. R. Co.* (C. C. A., 10, 1945), 150 F. 2d 28, 33.

class measured in terms of the value of allotment of securities made under the plan, cast a 50.93% adverse vote.* The plan authorized the acquisition, "whether through purchase, merger, or consolidation," by the reorganized company of the properties of the Augusta and Savannah Railroad, The Chattahoochee & Gulf Railroad Company, and South Western Railroad in exchange for securities of Central of Georgia Railway Company as reorganized.** Representatives of bondholders of the Central of Georgia Railway Company, including the holders of the Consolidated Mortgage Bonds, objected to the plan on the ground that it offered too much for the properties of the Augusta and Savannah, The Chattahoochee & Gulf, and the South Western. The effect of the confirmation was to make those objections unavailing, and the plan provided for a "forced merger" so far as objecting Central of Georgia bondholders were concerned.†

In considering what the petitioners' no-forced-merger doctrine would have meant to Section 77 proceedings it is not enough merely to refer to reorganizations in which "forced mergers" have been effected. There have been many other cases in which fear of an adverse vote—or the

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* See the opinion of the District Court, confirming the plan, in Volume XI of the record in *In the Matter of Central of Georgia Railway Company, Debtor*, No. 4829, United States District Court for the Southern District of Georgia, Savannah Division, at pages 3186-3199.

** The Commission's reports are in *Central of Georgia Railway Company Reorganization* (1945) 261 I. C. C. 263; (1945) 261 I. C. C. 501; (1946) 261 I. C. C. 627.

† The Augusta and Savannah and The Chattahoochee & Gulf were duly acquired and securities issued for their properties as provided in the plan. The South Western has not been acquired because of the legal complications which came before this Court in *Callaway* v. *Benton* (1949) 336 U. S. 132. The South Western properties may yet be acquired despite those complications, and the confirmation of the plan barred any further objection by the classes of Central of Georgia bondholders who voted to reject the plan.

inability to obtain an advance consent—would have prevented advantageous unifications which took place and greatly simplified corporate structures. *Chicago, R. I. & P. Ry. Co.* v. *Fleming* (C. C. A. 7, 1946) 157 F. 2d 241, contains a table at page 247 listing the various classes of creditors and stockholders affected by the Rock Island plan. Four of the corporations which issued bonds, The Chicago, Rock Island and Pacific Railway Company, Choctaw, Oklahoma & Gulf Railroad Company, St. Paul and Kansas City Railroad Company and the Rock Island, Arkansas and Louisville Railroad Company were "merged" under the plan as eventually consummated. What actually happened was that the assets of those several corporations were transferred to a new Chicago, Rock Island & Pacific *Railroad* Company. There was no advance consent and the vigor and variety of the litigation in the Rock Island reorganization* justifies the statement that if petitioners' no-forced-merger theory had been entertained the Commission would probably not have dared to provide for the unification which took place.

In *Consolidated Rock Products Company* v. *DuBois* (1941) 312 U. S. 510, this Court held that under Section 77B there could be a plan of reorganization for a parent corporation and its two wholly-owned subsidiaries under which the three corporations would be merged and the holders of bonds issued by one of the corporations would

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* The Commission's Reports, all entitled *Chicago, Rock Island & Pacific Railway Company Reorganization*, are as follows: (1940) 242 I. C. C. 298; (1941) 247 I. C. C. 533; (1941) 249 I. C. C. 297; (1942) 252 I. C. C. 483; (1944) 257 I. C. C. 265; and (1944) 257 I. C. C. 307. The appeals involving the approval of the plan are reported in *Chicago, Rock Island & Pacific Railway Company* v. *Fleming* (C. C. A. 7, 1946), 157 F. 2d 241, cert. den. *Chicago, Rock Island & Pacific Railway Co.* v. *Fleming* (1946) 329 U. S. 780, *Harrison* v. *Fleming* (1946) 329 U. S. 780, *Axelrod* v. *Fleming* (1946) 329 U. S. 811. The confirmation of the plan was ordered in *In re Chicago, R. I. & P. Ry. Co.* (C. C. A. 7, 1947) 160 F. 2d 942, cert. den. *Chase National Bank, Trustee* v. *Cheston* (1947) 332 U. S. 792, reh. den. (1947) 332 U. S. 826.

receive securities "of the whole enterprise on an equitable basis". Justice DOUGLAS said for the Court (p. 530):

> "The Circuit Court of Appeals, however, made certain statements which if taken literally do not comport with the requirements of the absolute priority rule. It apparently ruled that a class of claimants with a lien on specific properties must receive full compensation out of those properties, and that a plan of reorganization is per se unfair and inequitable if it substituted for several old bond issues, separately secured, new securities constituting an interest in all of the properties. That does not follow from *Case* v. *Los Angeles Lumber Products Co., supra.* If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid. So long as they receive full compensatory treatment and so long as each group shares in the securities of the whole enterprise on an equitable basis, the requirements of 'fair and equitable' are satisfied."

The effect of the decision in *Consolidated Rock Products Company* v. *DuBois* on railroad reorganization cases, particularly when followed by this Court's decision in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company* (1946) 328 U. S. 4395, was to assure the Commission and the interested parties that it was safe to develop plans of reorganization which provided for unifications by mergers, consolidations or transfer of assets so long as participants in the plans received full compensatory treatment and each group shared in the securities of the whole enterprise on an equitable basis.

The simplification of the corporate structures of railroads by Section 77 reorganizations has been outstanding. Had the petitioners' no-forced-merger theory prevailed, little could have been accomplished along that line.

No reference to this subject is made in the petitioners' briefs, although what we have said above about intra-

system mergers is not new. It was set forth in summary in the respondent's brief in opposition to the petition for certiorari (p. 38-39) and in greater detail in the respondent's briefs as an appellant in the Court of Appeals in 1949.

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The St. Joe Paper Company's complaint has been that it bought mortgage bonds on a particular property, including a main line from Jacksonville to Miami, appurtenant improvements and rolling stock, and that it does not want to take in exchange an investment in a larger enterprise in which the Jacksonville-Miami railroad will be only a part. However, the provision of the plan requiring the St. Joe Paper Company to surrender the mortgage bonds which it holds and to take the Atlantic Coast Line securities provided for in the Plan is not materially different from provisions of many plans of reorganization which have been effected.

Indeed, in railroad reorganizations it may be said to be the rule, rather than the exception, that a bondholder will be called upon to surrender mortgage bonds which are secured by a lien on one property in exchange for a smaller interest, represented wholly or in large part by preferred or common stock or both, in an aggregation of properties. Furthermore, commencing with this Court's decision in the *Denver & Rio Grande* case, in every instance where it has been necessary to utilize the "force" authorized by the "cram-down" provision in order to confirm a plan, that "force" has been utilized.

The tables in this Court's opinion in the *Denver & Rio Grande* case (328 U. S. p. 502-503) and in the opinion of the Court of Appeals for the Seventh Circuit in *Chicago, R. I. & P. Ry. Co.* v. *Fleming* (1946) 157 F. 2d 241, at page 247, present readily available examples of the type of exchanges which are common in railroad reorganization plans under Section 77.

To take one example, the table in the *Rock Island* opinion shows what the holders of Rock Island, Arkansas &

Louisana Railroad Company First Mortgage Bonds ultimately received under the *Rock Island* plan. Those bonds were a first lien on a line of railroad in Arkansas and Louisiana. For the Rock Island, Arkansas & Louisiana Railroad Company First Mortgage Bonds the bondholders received cash and a package of First Mortgage Bonds, Income Bonds, Preferred Stock and Common Stock (the total face amount of which was much less than the amount of the claims on the Rock Island, Arkansas & Louisiana Railroad Company First Mortgage Bonds) representing interests in a new Delaware corporation, the Chicago, Rock Island & Pacific Railroad Company, having lines of railroad in twelve states.

If the Atlantic Coast Line had bought all of the stock of the Florida East Coast, which is now valueless, and had itself been unable to meet its obligations in 1931, the two railroads would presumably have become debtors in the same Section 77 proceeding after the enactment of Section 77. In that event a requirement that the holders of the First and Refunding Mortgage Bonds take securities representing relatively small fractional interests in the whole enterprise would have seemed quite ordinary. Yet, with respect to any rights or just expectations of the St. Joe Paper Company, it is obviously immaterial that the Atlantic Coast Line has not owned, and does not own, the stock of the Florida East Coast and that the Atlantic Coast Line itself has not been a debtor in a Section 77 proceeding.

VII.

In most cases a requirement for the consent in advance of "equitable owners" would introduce such confusion and uncertainty as to make it impracticable even to try to develop a plan of reorganization which provided for the unification of two railroad corporations—whether in the same system or not.

The St. Joe Paper Company, Southern-Seaboard and R. L. E. A. briefs speak quite casually of obtaining the

consent of the "equitable owners of the property" before the Commission approves a plan of reorganization which provides for a merger or consolidation with another railroad corporation or a transfer of the debtor's assets to such a corporation. The briefs fail to discuss any of the steps which would have to be taken (see St. Joe Paper Company brief, p. 20).

The petitioners' brief in No. 37 goes into one important detail: it insists that there would have to be (p. 53) "the group vote of equitable owners at a regular or special meeting, on the question of corporate assent to the merger, consolidation or transfer, to be taken under § 5(11) of the Interstate Commerce Act, before the Commission can approve or certify the plan". The petitioners' counsel contrasts this vote with the later vote on the submission of the plan by the Commission pursuant to Section 77(e) and says (p. 54):

> "The first vote, the vote on the question of corporate assent to the merger, consolidation or transfer, is not by creditors and equitable owners, but is limited to equitable owners alone. It is not taken by submitting a question to each equitable owner individually, but is a group or collective vote at a regular or special meeting of the equitable owners."

In a case where there is only one class of stock which is admittedly valueless and one class of mortgage bonds which are secured by a lien on all of the debtor's property and are closely held, it might be possible to have a meeting of the bondholders in advance of the approval of a plan by the Commission. But such a situation would be very rare indeed.

Railroad corporations frequently have two or more classes of stock. A single railroad corporation may have several classes of bonds, some unsecured and some secured, with overlapping liens, one part of one issue pledged to se-

cure another issue and all manner of complications—to say nothing of substantial unmortgaged assets. There may be several debtors and one debtor may guarantee the obligations of another debtor. If bonds have been sold publicly, a large portion may be in bearer form so that notice of a meeting could be given only by publication.

The supposed requirement that the consent to the plan be given in advance of the approval of the plan by the Commission necessitates that the plan be developed before the meeting of the "equitable owners". The petitioners do not say who would develop it. They make no reference to the specific provision of Section 77(d) that the Commission may approve a plan "which may be different from any which has been proposed";* apparently they would treat that provision as inapplicable if there were a "merger plan". According to the petitioners, if a merger plan be approved in advance at a meeting of the "equitable owners", the Commission can approve it "as is"; otherwise the Commission would be powerless to approve any "merger plan" at all.

Assuming that a plan could be developed in advance of a proposed meeting of "equitable owners", some of the next questions would be these:

(1) Who would be the "equitable owners" entitled to vote at the meeting?

(2) How would it be possible to get adequate attendance at the meeting?

(3) Would all of the "equitable owners" have an equal voice if they were made up of holders of several different classes of securities?

At the time of any such meeting there would have been no determination by the Commission that any class of stock or claims was without value, or as to the value of the

* See page 58 above.

interests or claims of any class. How would the eligibility of "equitable owners" to vote at the meeting be determined? All determinations would have to depend upon hypotheses as to what would be decided later by the Commission and the Court. Suppose that the correct decision would be that the common stock should be excluded under a plan, the preferred stock allowed a small participation and four classes of bonds allowed to participate in different ways—who would be the "equitable owners"?

Even if a roster of "equitable owners" could be made up, the difficulties in securing the necessary attendance at a meeting and otherwise handling the matter of consents would obviously be very great, particularly if bearer bonds were involved. If the bonds were widely distributed, actual physical attendance of the holders could not be expected. Assuming that proxies could be used, it would be necessary to develop the whole procedure in connection therewith since there is nothing on the subject in Section 77.

With respect to the submission of a plan to the voting stockholders and creditors, Section 77 puts the Commission in charge, and the Commission now has an established procedure. The mechanics are necessarily difficult and several months are required to assemble and print the necessary material, send it out, allow the security holders adequate time and then count the ballots. If the petitioners' theory were correct, there would have to be *at least* as much work in connection with the proposed vote of "equitable owners". And the work would have to be undertaken under a serious disadvantage: Section 77 does not contain a word about any vote of equitable owners and no one would know who had any responsibility to conduct the vote or what to do

VIII.

In any consideration of the issue before this Court it should be taken to be established that

(1) The Commission's Plan is not merely "compatible with the public interest"; the public would derive many distinct advantages from the Plan.

(2) The Plan is not merely "fair and equitable" to the holders of the First and Refunding Mortgage Bonds as a class; it is "most favorable".

(3) The holders of at least $11,022,822 of Bonds have not opposed the Plan. It would be in their interest to have the Plan carried out.

(4) The St. Joe Paper Company's desire for control, and the incentives which the Paper Company has offered to the other bondholders, are responsible for the bondholder opposition to the Plan.

The question before this Court being a question of statutory construction, the merits of the Commission's Plan can hardly be said to be relevant. However, the petitioners herein—and to a much greater extent the petitioners in Nos. 33, 36 and 37—have attempted to convey the impression that the Commission acted arbitrarily, that the Plan is a poor plan, that the opposition to it is perfectly reasonable and that the holders of the unrepresented Bonds can be expected to oppose it. Any such impression would be wrong in every particular.

The points stated in the above heading are established by the findings which we have quoted or summarized above at pages 45-47 and by the Commission's findings as to "fair market values" and other data which we have summarized in the respondent's brief in No. 36 (p. 10-11, 13-15).

We can properly emphasize that the majority of the Court of Appeals found that Judge STRUM's findings, "rejecting the Commission's findings as to the public interest

and as to valuation, in declaring that the plan is unfair and inequitable, are themselves without support in law or in fact" (II, 729-730; 201 F. 2d 330), and that Judge RUSSELL's dissenting opinion did not express any disagreement with the majority about Judge STRUM's findings. Surely it is a safe assumption that the Court of Appeals would not have handed down such a holding, about a decision of a Judge of the same Court of Appeals while sitting in the District Court, unless they had been completely persuaded that a proper discharge of their judicial responsibilities required them to do so.

IX.

The history of railroad reorganizations and of Section 77 establishes that petitioners' construction of Section 77 is utterly inconsistent with the philosophy and objectives of that Section.

If a requirement for consents prior to the approval of a plan by the Commission would be workable at all, it would reintroduce into Section 77 reorganization procedure much of what was objectionable in equity reorganizations.

Much the largest part of the Southern-Seaboard brief is devoted to the legislative history of the Interstate Commerce Act. There is relatively little about the history of railroad reorganizations or Section 77.

It may be suitable to review briefly the history of railroad reorganizations and of Section 77 and to point up the inconsistency between the petitioners' contentions and the objectives and philosophy of Section 77.

Early in the history of railroad finance it became evident that ordinarily it was not practicable to sell a railroad or substantial railroad properties for cash and that it was necessary to effect reorganizations. *Canada Southern Railway Co.* v. *Gebhard* (1883) 109 U. S. 527, 539; *Continental Illinois National Bank & Trust Co.* v. *Chicago,*

Rock Island & Pacific Railway Co. (1935) 294 U. S. 648, 671-672.

Until less than forty years ago railroad reorganizations were handled by the security holders or their representatives with virtually no control over plans by the Courts and none whatever by the Commission. The conventional procedure, which was developed in the absence of a railroad reorganization statute, involved the appointment of reorganization managers, the institution of a friendly receivership, the filing of foreclosure bills, the formulation of a plan, the making of deposits under the plan and a foreclosure sale to execute the plan.*

A foreclosure sale was a mere technical device which had to be used because there was no statute providing for reorganizations; such a sale was usually necessary because only thus was it possible to transfer title to the properties and carry out a plan. The upset price was invariably fixed low enough so that a sufficient number of security holders would deposit under the plan and the success of the plan would not be jeopardized, and hence no practical protection was afforded to dissident security holders.

The Courts did not conceive that they had any responsibility for the fairness of reorganization plans until about thirty-five years ago. Then, as it became obvious that the terms of the plan were the heart of any reorganization

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* Byrne, *Foreclosure of Railroad Mortgages*, in *Some Legal Phases of Corporate Financing, Reorganization and Regulation* (1917) 77, 141-143; Cravath, *The Reorganization of Corporations*, in *Some Legal Phases of Corporate Financing, Reorganization and Regulation* (1917) 153, 193-198, 202; Spring, *Upset Prices in Corporate Reorganizations* (1919) 32 Harv. L. Rev. 489; Rosenberg, *Reorganization—The Next Step* (1922) 22 Col. L. Rev. 14; Swaine, *Reorganization—The Next Step: A Reply to Mr. James N. Rosenberg* (1922) 22 Col. L. Rev. 121; Weiner, *Conflicting Functions of the Upset Price in a Corporate Reorganization* (1927) 27 Col. L. Rev. 132; Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganizations* (1933) 19 Va. L. Rev. 541; Craven and Fuller, *The 1935 Amendments of the Railroad Bankruptcy Law* (1936) 49 Harv. L. Rev. 1254; and Swaine, *The Cravath Firm* (1948) Vol. II, 167-168.

and that judicial procedures were simply used to effect plans, the Courts proceeded cautiously to review the fairness of plans to some extent; but they acted without any statutory sanction and the extent of their authority and responsibility remained uncertain.*

After the enactment of the Transportation Act of 1920 the Commission had definite statutory responsibilities in connection with plans. It was called upon to authorize the issuance of new securities under Section 20a of the Interstate Commerce Act, to authorize the acquisition of properties under Section 1 (18) and to authorize unifications—by transfer, consolidation or merger—under Section 5.** However, the Commission found that the procedure was most unsatisfactory. Applications for Commission authority were not filed until so much had been done that its choice was ordinarily to approve or disapprove a virtual *fait accompli*. The public interest was inevitably subordinated to private interests.

Vigorous criticisms were also made of the effect on private interests of equity reorganization procedure. The smaller or unorganized security holders asserted that they were oppressed by the larger or organized groups and that they were unable to obtain from either the Commission or the Court a real determination of what was fair. On the other hand, those who were most prominent in reorganizations asserted that they were "held up" by dissenters and that because of the inadequacy of the equity procedure they were compelled to make unfair concessions.

The injuries suffered by investors like the unrepre-

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* Cf. *Guaranty Trust Co.* v. *International Steam Pump Co.* (C. C. A. 2, 1916) 231 F. 594, 595—not a railroad case; *Guaranty Trust Co.* v. *Missouri Pac. Ry. Co.* (E. D. Mo. 1916) 238 F. 812, 815; Swaine, *Reorganization of Corporations: Certain Developments of the Last Decade* (1927) 27 Col. L. Rev. 901, 910.

** 49 U. S. C. § 1 (18), 5, 20a.

sented holders of the $11,000,000 of Bonds in this case, who cannot as a practical matter organize themselves, were particularly stressed, shortly after the enactment of Section 77 in 1933, by Commissioner Eastman in his *Report of Federal Coordinator of Transportation, 1934*, House Doc. 89, 74th Cong., 1st Sess. (p. 36-37, italics supplied):

> "Railroad reorganizations have furnished some of the worst pages in the history of American finance and of the administration of the law. The insolvent railroad has often been the prey of professional and sometimes piratical reorganizers whose business it has been to salvage the property, if not primarily in their own interests, at least *with too little regard for the rights of the great groups of disorganized and discouraged investors.* This took place under a system of judicial administration where, on account of the complexities and the size of the problem and their unfamiliarity with it, the courts have frequently found themselves unable to administer the rights of the parties in accordance with any clear fundamental principle. The bondholders, particularly, have suffered from such experience."

The public interest and private interests in a reorganization can rarely be wholly separated. The reorganization of the *Milwaukee* which was commenced in 1928 afforded a striking example. In order to meet an objection the reorganization managers consented to increase by $2,300,000 the fixed charges which had been originally proposed; the Court did not concern itself with the matter; the Commission, with great reluctance, granted the applications which were filed under the Interstate Commerce Act, as amended by the Transportation Act of 1920, and permitted the plan to be consummated. The principal counsel for the reorganization managers later wrote that "in this concession, made against the better judgment of the managers, lay the seed of the St. Paul's 1935 bank-

ruptcy." Swaine, *The Cravath Firm* (1948) Vol. II, p. 418-431.

The whole reorganization procedure followed in the *Milwaukee* reorganization was criticized by the Commission in *Investigation of Chicago, Milwaukee & St. Paul Railway Company* (1928) 131 I. C. C. 615, and *Chicago, Milwaukee & St. Paul Railway Company Reorganization* (1928) 131 I. C. C. 673 and by Justice STONE in a dissenting opinion, concurred in by Justices HOLMES and BRANDEIS, in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1931) 282 U. S. 311. The Commission suggested that Congress act, and in the debates when a railroad reorganization statute was introduced in 1933 frequent references were made to what had taken place in the Milwaukee reorganization. *Congressional Record,* Vol. 76, Part 3, p. 2923-2927.

The leading spokesman for the new legislation in the House was Representative La Guardia, who was referred to by Representative Michener as "the only man on the committee who is entirely familiar with this section" (p. 2928). Representative La Guardia said (p. 2927) that it was

> "• • • the intent of the majority of the Committee on the Judiciary and the House to give the Interstate Commerce Commission broad and complete powers in the initiation, formulation, and approval of any plan for the reorganization of a railroad engaged in interstate commerce—this in addition to correcting the law established in the Chicago, Milwaukee, St. Paul & Pacific Railroad case, as I have repeatedly stated."

However, the provisions of Section 77 as originally adopted s. w that Congress had two qualms. How much power of a quasi-judicial character could be given to the Interstate Commerce Commission, an administrative body?

To what extent could it impinge upon the contractual rights and remedies of mortgage bondholders or others?

Section 77 in its original form was a cautious effort to deal with the fundamental problem. *Rodgers and Groom, Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act* (1933) 33 Col. L. Rev. 571. The distribution of power between the courts and the Commission was not altogether clear. Moreover, the security holders were permitted to retain what Justice REED later referred to in the *Denver & Rio Grande* case, 328 U. S. 495, 534-535, as a "veto power" and a "power of interference" which could result in a "blockade".

In 1935 Section 77 underwent a substantial revision. *Craven and Fuller, The 1935 Amendments of the Railroad Bankruptcy Law* (1936) 49 Harv. L. Rev. 1254.

One feature of the revision was the inclusion in subsection (e) of a paragraph relating to valuations which was later construed by this Court in the *Western Pacific* case (1943) 318 U. S. 472-473, as making a conclusion of the Commission with respect to the fairness of a plan final if "reached with material evidence to support the conclusion and in accordance with legal standards." On the same day on which the *Western Pacific* case was decided a similar ruling was made in the *Milwaukee* case (318 U. S. 523, 538-542, 564-566).

Another feature was the addition to subsection (e), of the "cram-down" provision,* which, as construed in the *Denver & Rio Grande* case (1946) 328 U. S. 495, has eliminated the necessity of securing assents of security holders to reorganization plans.

Between the time of the enactment of the amended Section 77 in 1935 and this Court's decision in the *Denver & Rio Grande* case in 1946 there were wide differences of opinion,

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* See *Swaine, A Decade of Railroad Reorganization Under Section 77 of the Federal Bankruptcy Act* (1943) 56 Harv. L. Rev. 1193, 1052-1054.

and great uncertainty, as to what the Court should consider when called upon to approve a plan which had been approved by the Commission, or to confirm a plan which had been approved by both the Commission and the Court. It was argued that, except as to the public interest, the Commission and the Court had concurrent jurisdiction to determine whether a plan was "fair" and that they had to agree. It was also argued that, even when both agreed that a plan was "fair," it could not be confirmed under the "cram-down" provision in the absence of the statutory two-thirds vote of each affected class unless it was shown that those who voted to reject the plan did so irrationally or arbitrarily. The first of these arguments was disposed of by the *Western Pacific* and the *Milwaukee* decisions in 1943 and the second by the *Denver & Rio Grande* decision in 1946.

In the meantime, this Court's opinions in *National Surety Company* v. *Coriell* (1933) 289 U. S. 426, *First National Bank* v. *Flershem* (1934) 290 U. S. 504, and *Case* v. *Los Angeles Lumber Co.* (1939) 308 U. S. 106, as reaffirmed and applied to reorganizations under Section 77 in the *Western Pacific* and *Denver* cases, made it perfectly clear that in reorganizations under Section 77 determinations as to what security holders were to receive should not be based upon agreements by majority or dominant groups of security holders—that all such determinations were to be made in the exercise of an informed judgment of the Government authority having the power to make them. Under Section 77B of the Bankruptcy Act the Government authority was, and under Chapter X it is, the Court. Under Section 77, as construed in the *Western Pacific* and *Milwaukee* cases, it is the Interstate Commerce Commission.

There has therefore been a dramatic shift of the primary power over railroad reorganizations—a shift from the organized groups of security holders to the Interstate

Commerce Commission. It acts subject to such legal limitations as are imposed on most administrative bodies and is to that extent subject to the Court.

An excellent summary of the changes which Section 77 effected will be found in Judge SWAN's opinion for a unanimous Court in *In re New York, New Haven & Hartford Ry. Co.* (C. C. A. 2, 1945) 147 F. 2d 40, 49:

> "Section 77 requires an independent determination by the Commission that the plan is 'fair and equitable'. The heart of such a determination is a finding of fact by the Commission as to the value of the debtor's property. It follows that that finding cannot be based upon the consent of some of the interested parties but must be a conclusion independently reached by the Commission upon a consideration of the evidence. One of the purposes of section 77 was to do away with an evil prevalent in reorganization through equity receivership proceedings, namely, the customary practice of submitting to the court a plan already consented to by a large proportion of the old security holders and thus exerting pressure on the court to approve it against objections of minorities, because failure to do so would mean the upsetting of a fait accompli and the undoing of an immense amount of effort and negotiation. See New England Coal & Coke Co. v. Rutland R. Co., 2 Cir., 143 F. 2d 179, 188; Fuller, The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations—A survey, 7 Law and Contemporary Problems (1940) 377, 384; S. E. C. Report on Protective and Reorganization Committees, Part VIII, 152. That it was improper for the equity court to yield to such pressure was clearly shown in First Nat. Bank v. Flersbem, 290 U. S. 504, at page 525, 54 S. Ct. 298 at page 306, 78 L. Ed. 465, 90 A. L. R. 391 by the statement: The failure to secure an adequate price seems to have been due, not to lack of opposing evidence, but to the mistaken belief that was the duty of the court to aid in effectuating the plan of reorganization, since

> a very large majority of the debenture holders had assented to it. See also National Surety Co. v. Coriell, 289 U. S. 426, 436, 53 S. Ct. 678, 681, 77 L. Ed. 1300, 88 A. L. R. 1231. Section 77 'manifests the intention of Congress to place reorganization under the leadership of the Commission' (Ecker v. Western Pac. R. Corp., 318 U. S. 448, at page 468, 63 S. Ct. 692, at page 705, 87 L. Ed. 892), and we cannot doubt that the Commission must approve the plan in the exercise of an independent judgment uninfluenced by the fact that interested parties have agreed upon its terms. Consequently it would be a serious departure from the statute if the Commission approved a valuation for Old Colony assets because of fears that, should it fix any other, a previous agreement negotiated by a substantial number of interested security holders would be upset, with consequent delay in consummating a reorganization."

In this case the petitioners contend, in effect, that the agreements or preferences of majority groups of security holders should prevail. They attempt to turn back the clock and reestablish the equity reorganization procedure which prevailed prior to 1933. That doubtless explains why they seek to dismiss the Section 77 proceeding and reactivate the moribund equity receivership.

X.

The legislative history data cited by the petitioners do not support their contentions.

Although the petitioners for the first time now contend that Section 77 supports their no-forced-merger theory on its face, it is evident they still place their greatest reliance on the legislative history data which they cite.

It is unnecessary to say that, if the meaning of Section

77 be plain, there can be no recourse to legislative history. *Ex parte Collett* (1949) 337 U. S. 55, 61; *Unexcelled Chemical Corp.* v. *United States* (1953) 345 U. S. 59.

The meaning of Section 77 is plain, but we will consider the petitioners' legislative history data chronologically.

There is nothing in the legislative history data pertaining to the period prior to 1933 which has the remotest bearing on the issue before this Court.

The St. Joe Paper Company brief refers (p. 6-7) to the decision of the Congress made in 1920 to have only "permissive consolidation" as contrasted with "compulsory consolidation". The Southern-Seaboard brief, postulating that Section 77 of the Bankruptcy Act "was not written on a clean slate", gives a good deal more legislative history data about the period prior to 1933, going as far back as 1887 (p. 30-33).

These data show only one thing: Congress was not willing to adopt a *general* plan for the forced merger or compulsory consolidation of *all railroads.* That, of course, was brought out in Justice JACKSON's opinion in *Schwabacher* v. *United States* (1948) 344 U. S. 182, 191-192.

The unwillingness of the Congress to enact, either before or after 1933, a *general* consolidation law, *applicable to solvent railroad corporations,* providing for compulsory consolidations has not the slightest tendency to establish the meaning of the specific amendments of the Bankruptcy Act in 1933 and 1935 which related to bankrupt railroad corporations only.

The origin of the consistency clause in 1933 and Commissioner Eastman's statement.

In general the subjects now covered in clause (5) of Section 77(b) were covered in clause (3) of the original

Section 77(b) as enacted in 1933 and in part the present consistency clause originates from the original Section 77(b)(3).

One of the items of legislative history particularly relied upon by the St. Joe Paper Company (p. 22-23) and the Southern-Seaboard (p. 41-44) is a letter written by Commissioner Eastman, Chairman of the Legislative Committee of the Interstate Commerce Commission to Senator Hastings on January 31, 1933, in which Mr. Eastman suggested amendments of the draft of the bill which later became Section 77. The amendments included the words italicized in the petitioners' quotation from the letter, which is as follows:

"Clause (3) subdivision (b), page 26:

"(3) shall provide adequate means for the execution of the plan, which may, *so far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act, as amended,* include the transfer of all or any part of the property of the debtor to another *railroad* corporation or to other *railroad* corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation, and the issuance, *so far as may be consistent with the provisions of section 20a of the Interstate Commerce Act, as amended,* of securities of either the debtor or any such *railroad* corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes;

"*Explanation.*—This act ought not to authorize railroad mergers or consolidations or the transfer of railroad properties or the issuance of railroad securities which are inconsistent with the applicable provisions of the Interstate Commerce Act, particularly the consolidation plan provisions. These amendments are intended to avoid that possibility."

It will be observed immediately that the words first italicised are the same as those to be found in the present subsection (f) except that there is no reference to "purposes". The most that the words require is consistency with the provisions of Sections 1 and 5 of the Interstate Commerce Act.

The second, and perhaps more important, thing to be observed relates to the "Explanation". Commissioner Eastman did not wish to have Section 77 "authorize railroad mergers or consolidations or the transfer of railroad properties * * * which are inconsistent with the applicable provisions of the Interstate Commerce Act, *particularly the consolidation plan provisions*" (italics supplied). The consolidation plan provisions were those referred to in *Schwabacher* v. *United States*, 334 U. S. 182 at pages 191-193. If the "master plan" for a "nationwide consolidations of railway properties of the country" allotted a debtor to one system, Commissioner Eastman did not want to have the debtor transferred to another system under a Section 77 plan.

However, the St. Joe Paper Company brief says (p. 23):

> "Eastman's suggestion was adopted. His proposal was for the very purpose of providing that mergers in reorganizations in bankruptcies had to be made pursuant to the provisions of the Interstate Commerce Act which required initiation by and consent of the carriers."

We find no evidence to support this statement and no basis for it.

Counsel undertake to state Commissioner Eastman's "very purpose". The only evidence of Commissioner Eastman's purpose consists of the amendment which he proposed and the Explanation. The Explanation follows the phraseology of the proposed amendment verbatim except for the words "particularly the consolidated plan provisions".

Laying those words to one side, the data (the proposed amendment and the Explanation of it) neither say nor suggest that Commissioner Eastman proposed the amendment "for the very purpose of providing that reorganizations in bankruptcies had to be made pursuant to the Interstate Commerce Act which required initiation by and the consent of the carriers". There is an obvious and marked difference between the words "*consistent with*" and the words "*pursuant to*". And there is no reference in Commissioner Eastman's proposed amendment or in his Explanation to "initiation by and consent of the carriers" or anything of that sort.

However, the words "*particularly the consolidation plan provisions*" do add something to the phraseology of the proposed amendment and do tell something of Commissioner Eastman's "very purpose". As we have said, they indicate quite clearly that he had in mind consistency with respect to the *public interest aspects* of mergers, consolidations and transfers of railroad properties, particularly the consolidation plan provisions.

The Southern-Seaboard brief says (p. 43-44, italics supplied in part):

> "Thus the 'consistency clause' was written into the bill that became the Act of 1933 at the express recommendation of Mr. Eastman as Chairman of the Commission's Legislative Committee and for the very purpose of making it clear that no power as to merger or consolidation of railroads would be vested in the Commission by that Act inconsistent with or *going beyond the power under* Sections 1 and 5 of the Interstate Commerce Act, which gave no power of compulsory merger or consolidation but was confined to empowering the Commission to authorize only a *voluntary* merger or consolidation."

Here again we have a plain unwillingness on the part of the petitioners to let the legislative history data speak

for themselves. Both Commissioner Eastman's proposed amendment and his Explanation of the amendment used the words "inconsistent with". The Southern-Seaboard brief uses words "inconsistent with *or going beyond its power under*". The difference is obvious.

The statements on the floor of the House in 1933.

The petitioners make three assertions about statements on the floor of the House in 1933.

(1)

The first relates to a colloquy between Congressman Horr and Congressman Hatton Sumners of Texas. (St. Joe Paper Company brief p. 23; Southern-Seaboard brief p. 44):

> "Mr. Horr: May I inquire whether or not, where the word 'reorganization' is used, the gentleman is of the opinion that this would encourage consolidation of railroads?
>
> Mr. Sumners of Texas: They could not be consolidated in violation of the interstate commerce act.
>
> Mr. Horr: They would first have to go through that?
>
> Mr. Sumners of Texas: They would first have to go through that."

It would hardly occur to anyone that this colloquy, which will be found in 76 Congressional Record 2909 (1933), has any significance. However the quotation of the colloquy is preceded in the two petitioners' briefs by the statement that:

> "• • • Representative Horr was concerned lest the consolidation provision of clause (3) of subdivision (b) of the bill might give the Commission power to compel consolidations."

There is nothing in the Congressional Record which gives any hint as to what "concerned" Representative Horr, except the two questions which he put. He did not say

anything about "power to compel consolidation"; the words he used were "encourage consolidation".

(2)

After referring to the Horr-Sumners colloquy, each of the two briefs says (St. Joe Paper Company brief p. 23-24; Southern-Seaboard brief p. 44, italics supplied):

> "*After a number of other Congressmen had expressed the fear that the legislation would increase the Commission's consolidation power,* Congressman Rayburn took the floor to allay that fear."

They then quote a statement made by Congressman Rayburn which will be found at pages 2917-2918 of Vol. 76 of the Congressional Record.

The Congressional Record discloses that no other Congressman "expressed the fear that the legislation would increase the Commission's consolidation power". *The only fear expressed by any Congressman, in the interval between the Horr-Sumners colloquy and Congressman Rayburn's statement, had nothing to do with "forced mergers" or "compulsory consolidations".*

Between the time when the Horr-Sumner colloquy ended and the time when "Congressman Rayburn took the floor" eleven Congressmen, other than Congressmen Sumners and Rayburn, participated in the debate and only one, Congressman Mapes, so much as referred to the matter of consolidations. Congressman Mapes said (p. 2916)

> "This bill provides that a railroad corporation, subject to first being able to obtain the permission of the Interstate Commerce Commission, if it is unable to meet its debts as they mature, may file a petition with the court and take advantage of its provisions. The language is broad enough so that the 100 of the 138 legally solvent Class I railroads of the country may come under it if they choose to do so, and if they can get the approval of the

> Interstate Commerce Commission for that purpose. Upon filing a petition with the court, subject to the approval of the Interstate Commerce Commission, they may transfer their stock from one corporation to another or merge or consolidate with other railroad corporations. Who can tell what the set-up of the railroads of the country would be in the end if all of them who are able to do so should elect to take advantage of this legislation if it is enacted into law?"

Evidently Congressman Mapes was fearful that the proposed new Section would permit collusive voluntary consolidations in connection with which the public interest would not be protected. He pointed out that, in order to resort to Section 77, it would be necessary only to allege that a railroad corporation was "unable to meet its debts as they mature" and he foresaw the possibility that a very large proportion of the solvent railroads could make such an allegation. His fear did not relate in any way to the imposition of "force" or "compulsion" on carriers, stockholders or creditors—it related to possible collusive voluntary consolidations which would not be in the public interest. He wanted to make sure that the Commission would be able to guard the public interest under Section 77 as well as it could under the Interstate Commerce Act.

The appearance in the St. Joe Paper Company brief (p. 23-24) and the Southern-Seaboard brief (p. 44) of the identical statement that "a number of other Congressmen had expressed the fear that the legislation would increase the Commission's consolidation power", which is refuted by the Congressional Record, suggests that both briefs took the statement from the same source and that the correctness of it was not independently checked for the briefs in this Court.*

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* Both briefs apparently took the statement verbatim from the Southern-Seaboard brief in the Court of Appeals, dated August 27, 1949 (p. 31).

(3)

The next item quoted is a statement made by Congressman Rayburn, which appears at pages 2917-2918 of the Congressional Record (St. Joe Paper Company brief, p. 24; Southern-Seaboard brief, p. 44-45):

> "Fear has been expressed that with the enactment of this bill the powers of the Interstate Commerce Commission and the courts over consolidations and mergers would be expanded. It is my firm conviction that this proposal in specific provisions safeguards the present consolidation and merger provisions of the interstate commerce act and gives no additional authority to the Commission or the courts in these matters."

The fear expressed was that of Congressman Mapes, from whom we have quoted above, relating to possible collusive voluntary consolidations which would be inimical to the public interest.

The St. Joe Paper Company brief says (p. 24, italics supplied):

> "The intention of Congress, in passing the Act of 1933, not to extend or enlarge the Interstate Commerce Act powers of the Commission over mergers and consolidations, *and not to give it any compulsory power*, could not have been made more clear. That was the very purpose of writing in the 'consistency clause' and the very reason for which Mr. Eastman suggested to Senator Hastings that it be written in."

A substantially identical statement appears in the Southern-Seaboard brief (p. 45). Both are taken from the Southern-Seaboard brief in the Court of Appeals of August 27, 1949 (p. 32).

Congressman Rayburn did not say anything about "compulsory power". Neither had Mr. Eastman said anything about "compulsory power". Nor had Congressman

Sumners. And the "other Congressmen" who are said to have expressed fear on that point are mythical.

Furthermore, the issue here is whether by the combined action of the Commission and the Court a plan of reorganization can be made effective over the opposition of the St. Joe Paper Company, the holder of a majority in amount of the First and Refunding Mortgage Bonds. The original 1933 Act, which Congress Rayburn was discussing, gave "no additional authority to the Commission or the court" to override the opposition of such a majority bondholder as the St. Joe Paper Company. That was not a result of the "consistency clause" in Section 77(b)(3). It was the result of the requirement for a favorable vote of two-thirds in amount of each class of creditors of the debtor in order to make a plan effective (47 Stat. 1478).

The alleged concession of counsel for the Atlantic Coast Line about the 1933 Act.

The St. Joe Paper Company brief says (p. 19):

> "It seems to have been conceded by all parties that Section 77, as enacted in 1933, withheld from the Commission authority to certify a plan for merger, not consented to by the carriers. The provisions of the 1933 Act having that effect were preserved in the 1935 legislation. If the consistency clause in 1933 had that effect, how can the same provisions incorporated in the 1935 amendments have a different meaning?"

The statement in the first sentence is probably based upon the alleged concession of counsel for the Atlantic Coast Line which is referred to more fully in the Southern Seaboard brief (p. 22-23, footnote omitted):

> "It has never been contended by respondent that Section 77 as enacted in 1933 conferred any compulsory power on the Commission with reference to consolidation or merger of debtor railroads. In fact,

in his argument to the Commission in the proceeding culminating in its Fourth Supplemental Report, 267 I. C. C. 729, Mr. Edward W. Bourne, then and now leading counsel for respondent, expressly declared to the Commission that at the time the 1933 Act was passed, Congressman Rayburn was entirely right in stating that nobody intended to extend the power to have compulsory consolidations; that 'the whole 1933 Act was a consent Act'; that there was no grant of any compulsory power by the 1933 Act; but that it was the 1935 amendatory Act that brought in the provision for asserted compulsory power upon which he and respondent relied (*i.e.*, the 'cram-down' provision of subdivision (e) of the Act of 1935, upon which respondent, the Commission, and apparently the Court of Apeals below have solely relied)."

The statement made by Atlantic Coast Line's counsel, on which the petitioners rely, was made on the reargument before the Interstate Commerce Commission which took place on January 7, 8 and 9, 1948. The transcript (p. 4843-5236) is included in the unprinted portions of the record in this Court (I, 189).

On the second day of the argument counsel for St. Joe Paper Company for the first time advanced the no-forced-merger argument, in much the same form in which it was presented later before Judge SIBLEY and the Court of Appeals although in less detail (p. 4995-5010). He spoke of "compulsory consolidations" (p. 4996) and of merging "two carriers against the will of one of them". The Coast Line's counsel understood that the argument about "compulsory consolidations" related to compulsion against the St. Joe Paper Company and any other holder or holders of a majority in amount of the First and Refunding Mortgage Bonds who might oppose a unification of the Florida East Coast and the Atlantic Coast Line and said (p. 5203):

> "The whole 1933 act was a consent Act. Two-thirds vote. Of course, I really think that all the Congress-

men were interested in were two things: The Anti-Trust Laws, and the consolidation plan requirements which then existed and which have since been repealed.

"Be that as it may, there was no extension of the power by the 1933 Act. It was the 1935 Act which brought in the provision that was passed on in the Denver case, and all talk about who said what on the floors of Congress in the 1933 Act considerations has absolutely nothing whatever to do with the case."

It is quite plain that when counsel said that, "The whole 1933 Act was a consent Act" and that "there was no extension of the power by the 1933 Act", he was speaking of "consent" and "power" with relation to a class of bondholders like the First and Refunding Mortgage Bondholders. He dismissed as "preposterous" the suggestion that in this case the consent of the Debtor or its stockholders was necessary (p. 5203). He considered that the only issue was as to "consent" and "power" with relation to the St. Joe Paper Company and any of those aligned with the Paper Company who were opposing a "merger plan". When he said, "The whole 1933 Act was a consent act. Two-thirds vote", his reference was obviously to the provisions of Section 77 (e) which required acceptance of the plan "by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims or interests would be affected by the plan" (47 Stat. 1478). And, as he said, the 1935 revision of the Act brought in the "cram-down" provision which authorized the application of "force" or "compulsion" against the St. Joe Paper Company and any bondholders aligned with it.

Any implication in the briefs that counsel for the Atlantic Coast Line conceded that the so-called "consistency clause" in Section 77(b)(3) of the 1933 Act had anything to do with any consent on the part of the Debtor, its stockholders or creditors would not be justified. We are not

sure that there is any, but the arguments in the petitioners' brief glide from one point to another and we cannot be sure.

The Atlantic Coast Line does not concede "that Section 77 as enacted in 1933 withheld from the Commission authority to certify a plan for a merger, not consented to by the carriers".* As we read the original Act, it seems clear that a merger plan could have been effected thereunder in a case where the Court determined that the corporation was "insolvent", provided that the plan was accepted "by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims or interests would be affected by the plan" (47 Stat. 1478). Indeed, the petitioners' own arguments lead to the conclusion that it would not have been necessary under the 1933 Act to get the consent of the "carrier"—that is, of the debtor—in a case where the debtor had been determined to be insolvent, because, like the respondent, they consider it silly to assume that Section 77 requires the consent of a corporation which has been determined to be insolvent.

The Report of Commissioner Eastman as Federal Coordinator of Transportation in 1934.

The next item on which the petitioners rely is the Report of the Federal Coordinator of Transportation, 1934 (House Doc. 89, 74th Cong., 1st Sess.).

The St. Joe Paper Company brief (p. 25) and the Seaboard-Southern brief (p. 49-50) each devote about a page to the Coordinator's 1934 Report.

The Report contains separate sections entitled respectively "Railroad Financial Reorganizations" (p. 35-40) and "Consolidations and Unifications" (p. 40-43). The

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* It is possible that in the mass of material on this subject and the petitioners' ever-changing uses of the terms "forced mergers" and "compulsory consolidations" counsel for the Atlantic Coast Line may at some time have said something which other counsel have interpreted as such a concession. However, none of the briefs cites anything of the sort.

section entitled "Railroad Financial Reorganizations" discusses Section 77 and it is from that section that the petitioners have extracted the excerpts relating to the "cramdown" provision that we discuss later.

The other section entitled "Consolidations and Unifications" relates to consolidations and unifications under the Transportation Act, 1920—the Act which provided for what this Court called the "plan for nationwide consolidations of the railway properties of the country." *Schwabacher* v. *United States* (1948) 334 U. S. 182, 192. The Report thus distinguishes, as we do, between Section 77, which deals with reorganizations of bankrupt railroads, and the Interstate Commerce Act, which deals primarily (although not exclusively) with solvent railroads.

The Southern-Seaboard brief (p. 50) quotes Mr. Eastman as having said in his Report at page 41

> "Consummation [of consolidation plans] is dependent wholly upon the voluntary action of the carriers. No matter how good a plan it may be, it can only be made effective to the extent that it is to their liking."

The insertion of the words in brackets makes it appear as if Commissioner Eastman was speaking of *all* consolidation plans, including plans under Section 77 that involved consolidations. Actually Mr. Eastman was speaking only of the consolidation plan which was contemplated by the Transportation Act, 1920, i.e. "the plan for nationwide consolidations of the railway properties of the country." That appears from a somewhat fuller quotation from Mr. Eastman's report at page 41 (italics supplied):

> "What happened with respect *to the consolidation plan* was described at some length in the Coordinator's First Report, and need not be repeated here. For present purposes, it will suffice to say that the following weaknesses in these provisions of the Transportation Act, 1920, have been developed:

1. Consummation is dependent wholly upon the voluntary action of the carriers. No matter how good a plan it may be, it can only be made effective to the extent that it is to their liking."

The St. Joe Paper Company brief says (p. 23, italics in that brief) that

> "• • • Mr. Eastman thought that there was no Act of Congress which enabled the Interstate Commerce Commission to order compulsory mergers, without the consent of the carriers. He discussed changes in the law to make such mergers possible, and wound up thus:
>
> > 'Under present financial conditions, however, it seems unlikely that there will be immediate need for these changes in the statutory provisions relating to consolidations or other unifications of carriers, and for that reason, and in view of the extent and complexity of the other transportation legislation which is herein recommended, *these changes will not now be recommended.*' "

We do not agree that Mr. Eastman's discussion related to proposed changes in the law to make "compulsory mergers" possible. But our disagreement on this point may involve only the meaning of the term "compulsory mergers". It is more important that the Coordinator's Report was issued in January, 1935 and the section of the Report which we have been discussing related to consolidations and unifications of *solvent* railroads. The fact that in January, 1935, Commissioner Eastman thought that it was impracticable to get general legislation authorizing the compulsory consolidation of solvent railroads has no tendency to establish that in August, 1935, the Congress was unwilling to authorize "compulsion" against a class of bondholders of a bankrupt railroad.

Mr. Leslie Craven's statement at the hearing on the revision in 1935.

The next item relied upon by the petitioners (St. Joe Paper Company brief p. 24-26; Seaboard-Southern brief p. 47-49) is a statement made by Mr. Leslie Craven, counsel for Commissioner Eastman as Federal Coordinator of Transportation, at a committee hearing in connection with the 1935 revision of Section 77. Mr. Craven said (italics supplied in the St. Joe Paper Company brief):

> "There is another provision with reference to the jurisdiction of the Commission as to sales and consolidations. I do not know that I can lay my finger on it this minute, *but it has the same provision which was in the previous act. We have not disturbed it.*
>
> The Chairman: It does not modify this power, does it?
>
> Mr. Craven: No, sir.
>
> The Chairman: Anyhow, it is in the law, and you say that it is in this bill?
>
> Mr. Craven: Yes. The jurisdiction of the Commission with reference to the issuance of securities, or with reference to sales, consolidations or mergers of debtors' property, is in lines 1 to 8 on page 26."

The statement in the Seaboard-Southern brief (p. 47-49) is somewhat fuller but the differences between the two briefs are not sufficiently significant to require comment.

It seems hardly conceivable that this non-committal statement by Mr. Craven is seriously relied upon as proving anything. The words which counsel for the St. Joe Paper Company have italicized merely stated that the proposed revision of Section 77 had the same provision which was in the previous Act, and that was true. Even if such a statement might be relevant to an argument that the transposition of the "consistency clause" from Section 77(b)(3) to Section 77(f) was not intended to change the effect of the consistency clause, the question would still remain: What was the consistency clause intended to accomplish?

The shift in 1935 to subsection (f) of the "consistency clauses" from the original Section 77(b)(3) and Section 77(e) of the 1933 Act.

As we have pointed out above at pages 5-8, until this Court's decision in *Unexcelled Chemical Corp.* v. *United States* (1953) 345 U. S. 59, the petitioners' argument ran as follows:

First: Under Section 77, as enacted in 1933, a "forced merger" was unauthorized.

Second: There were two consistency clauses in the 1933 Act: one in (b) which mentioned "provisions" and one in (e) which mentioned "purposes". They barred a "forced merger".

Third: In 1935 they "became accidentally misplaced in redrafting the Act", as Judge SIBLEY said (V, 475; 81 F. Supp. 932). This accidental misplacement consisted of a transfer and consolidation of the two clauses into the single clause in subsection (f).

Fourth: As a result of the accidental misplacement of the consistency clause, Section 77 now reads as if it authorized a "forced merger".

Fifth: Legislative history shows that the Congress did not intend to authorize a "forced merger" and should prevail over the wording of the statute.

The theory about accidental misplacement was an indispensable link in the chain of the argument.

The respondent's position has been and is:

First: We agree that the Commission's Plan could not have been carried out under Section 77 in its original 1933 form over the objections of the holder of a majority in amount of the First and Refunding Mortgage Bonds. That is because, before the enactment of the cram-down provision in 1935, anything more than one-third in amount of a class of creditors like the holders of the First and Refunding Mortgage Bonds in this case could

block a plan whether it provided for a "merger" or not (47 Stat. 1478).

However, even under the 1933 Act there could have been a "forced merger" in one of the senses in which the petitioners use that undefined term. If the Court determined that the debtor was insolvent, then a "merger" could be "forced" as against the stockholders, although not as against the creditors (*id.*).

Second: The two consistency clauses in the 1933 Act had nothing to do with the legality of a "forced merger", however that is defined. They referred, as does the consistency clause now, to the public interest aspects of a unification.

Third: There is no basis for a supposition that the consistency clause became accidentally misplaced in redrafting the act.

Blocked by this Court's decision in *Unexcelled Chemical Corp.* v. *United States* (1953) 345 U. S. 59 from contending any longer that the consistency clause was accidentally misplaced in subsection (f), the petitioners apparently now say that subsection (f) is "an appropriate place for it" (St. Joe Paper Company brief, p. 19).

We agree that subsection (f) is a more logical place for the clause than subsection 77(b), because the purpose of the clause really has no relationship to the attributes of a plan which are specified in Section 77(b). Presumably that is why the clause was moved out of Section 77(b).

With the abandonment by the petitioners of their contention that the consistency clause was accidentally misplaced and the acknowledgment that subsection (f) is "an appropriate place for it", the petitioners' argument that the clause qualifies Section 77(b)(5) collapses. If it had been the intention of the Congress that the consistency clause was to qualify Section 77(b) in the way asserted by the petitioners, it would certainly not have been "appro-

priate" to take the clause out of Section 77(b) and put it in Section 77(f). The transposition of the clause in 1935, which is now admitted not to have been the result of accidental misplacement, supports the respondent's contention that the clause was intended to relate to public interest matters not within the purview of Section 77(b).

The Southern-Seaboard argument about the intent of the legislators.

The Seaboard-Southern brief has a section (p. 50-52) which undertakes to show that "the changes in Section 77 effected by the 1935 Act were summarized in detail" on several occasions "and a change in the Commission's power over consolidations was never referred to as a feature of the bill".

This is a novel sort of a negative argument. It assumes that the clear language of an Act of Congress should not be interpreted to mean what it says unless there be some summary, made at the time, which says that it means what it says.

The Commission's power to approve the plan in this case does not come from "an absence of express prohibition". It comes from the express provisions of Section 77.

The heading of a separate subsection of the Seaboard-Southern brief states that "the power claimed by the Commission cannot come from an absence of express prohibition". The argument runs as follows (p. 52):

> "In the holding by the majority of six members of the Commission, in 267 I. C. C. 731-732, which was expressly disapproved by Circuit Judge SHILEY, that majority made the novel argument that a plan calling for a forced merger was not inconsistent with the Interstate Commerce Act for the reason that '• • • There is nothing in the Interstate Commerce Act to prohibit us from approving such a transaction'.

"This propounds a wholly new theory of administrative law—that an administrative body possessing only delegated powers may exercise any power not specifically prohibited to it by the delegating statute. This is not the law."

The Commission's Report, which the petitioners cite (267 I. C. C. 730-732), sets forth the express provisions of Section 77 which authorized the Commission to approve the Plan. The Commission also set forth the provisions of subsection (f) of Section 77 relating to the Interstate Commerce Act and said: "There is nothing in the Interstate Commerce Act to prohibit us from approving such a transaction".

The "delegating statute" was Section 77 and the question before the Commission was whether anything in the Interstate Commerce Act prohibited it from exercising powers expressly delegated in Section 77. The statement of that question did not involve propounding "a wholly new theory of administrative law".

The other legislative history data referred to in the Southern-Seaboard brief.

Other data are referred to in the Southern-Seaboard brief, but they seem so clearly without significance as not to require discussion.

Summary as to the petitioners' legislative history argument.

The petitioners are not content to let their legislative history data speak for themselves. In practically every instance the quotation of or reference to the *source material* is supplemented by *comments* and the comments usually attribute to the source material a meaning quite different from what appears to be natural.

The several items of data, whether viewed separately or collectively, impress us as extraordinarily inconclusive

and dependent for any supposed significance on the comments which precede or follow them. Not one is phrased in terms which make the data clearly relevant to the issue in this case.

When some of the items are correctly presented and analyzed, it becomes evident that they tend to support the respondent rather than the petitioners.

These weaknesses in the data should not obscure other aspects of the petitioners' resort to legislative history:

First: Since the provisions of Section 77 are unambiguous, there is no occasion for any resort to legislative history.

Second: The legislative history data do not include any Committee reports. While they contain statements by individuals who had some responsibility for Section 77 and its revision in 1935 (Commissioner Eastman, Representative Sumners, Representative Rayburn and Mr. Craven), the only written statement is that of Commissioner Eastman relating to 77(b)(3) and that, as we have shown, tends to refute the petitioners rather than to support them.

Although the Seaboard-Southern counsel obviously conducted a most extensive research in an effort to find legislative history data that would support the no-forced-merger theory, all that they have been able to assemble are the items which we have reviewed above.

The petitioners' reliance on legislative history data has a definite relation to the point, which we made earlier, that the no-forced-merger theory was never brought forth until January 8, 1948. The Commission, its staff, the parties and counsel all worked for years on the case without any suggestion that there were legislative history data which would show what the petitioners now claim. Then on January 8, 1948 the data were referred to for the first time. We submit that it would be a strange system of law

under which the legislative history data which the petitioners' adduce would have the effect which they hope to achieve.

XI.

If the provisions of Section 77 were not plain and unambiguous, the Commission's construction would be entitled to great weight.

The Commission's Fourth Supplemental Report contains a persuasive analysis of the petitioners' contentions which the Commission rejected.

The criticisms by the Railway Labor Executives' Association of the Commission's discussion of the issue do not require any answer.

If the provisions of Section 77 were not plain and unambiguous, the Commission's construction would be entitled to great weight. *United States* v. *American Trucking Associations, Inc.* (1940) 310 U. S. 534, 549; *Medo Photo Supply Corp.* v. *National Labor Relations Board* (1944) 321 U. S. 678, 681 footnote; *National Labor Relations Board* v. *Hearst Publications, Inc.* (1944) 322 U. S. 111, 130-131; *Skidmore* v. *Swift & Co.* (1944) 323 U. S. 134; *Boutell* v. *Walling* (1946) 327 U. S. 463, 470-471.

The Commission's Fourth Supplemental Report contains a detailed and convincing analysis of the petitioners' contentions and the pertinent provisions of Section 77 and the Interstate Commerce Act (267 I. C. C. 730-732), which we have quoted in full at pages 31-34 above.

The minority of the Commission expressed no disagreement with the majority at that time (267 I. C. C. 175-176). In the Fifth Supplemental Report the minority (there were three) said that they were not convinced "that the Bankruptcy Act properly may be used to implement a transaction which is beyond the scope and powers of the Commission under the Interstate Commerce Act" (282 I. C. C. 190). There was no discussion in the minority opinion of the various provisions of the two Acts.

Particular attention may be called to the reference to the Commission's Plan as "a transaction which is *beyond the scope and powers of the Commission under the Interstate Commerce Act.*" The words used are apt: the carrying out of such a plan *is* "beyond the scope and powers of the Commission under the Interstate Commerce Act." It is *not* "inconsistent with the provisions and purposes of the Interstate Commerce Act". It was obviously the intention that under Section 77 there should be plans of reorganization of bankrupt railroad corporations which would be "beyond the scope and powers of the Commission under the Interstate Commerce Act", although not in any way inconsistent with the latter Act.

The brief of the Railway Labor Executives' Association consists principally of a challenge of the Commission's discussion of the issues in the Fourth Supplemental Report. As we have pointed out above at page 24, the Railway Labor Executives' Association really has no justiciable interest in this case. We do not believe that we could on that account fail to answer the Association's brief if the brief seemed otherwise to require an answer. However, we have reviewed the brief and the paragraphs of the Commission's Fourth Supplemental Report which are discussed in the brief and we are satisfied that to answer the brief in detail would merely result in repeating what has already been said or in pointing out what is obvious.

However, one point can be mentioned. The brief (p. 18-21) stresses what the Commission had to say about the location of the consistency clause. And Judge SIBLEY's opinion reads (see above, p. 35) as if the Commission did not mention anything except the location of the consistency clause.

Actually the Commission answered succinctly all the principal no-forced-merger arguments. Its point about the location of the consistency clause was that if Congress had intended to qualify Section 77(b)(5) it would hardly have put the qualification in a clause in Section 77(f). The

mere location of the clause would, of course, not be decisive as to its meaning but there can be no doubt that the inclusion in subsection (f) of such a clause as the consistency clause would be an odd way to limit Section 77(b)(5).

XII.

The cram-down provision of Section 77 empowers the Court to confirm the Commission's Plan in this case over the objection of the St. Joe Paper Company and any other bondholders which may oppose the Plan.

Under this Court's decision in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495 the Court should confirm the Plan, even though there be an adverse vote, unless there be a change in conditions which will make the Plan unfair to the bondholders.

All of the petitioners' briefs refer in some detail to confirmation of the Plan and the cram-down provision (St. Joe Paper Company brief, p. 28-31; Southern-Seaboard brief, p. 53-63; R. L. E. A. brief, p. 22-29).

The provision of Section 77 which governs confirmation and contains the cram-down provision is quoted above at page 15 and at pages 60-61 and also in Appendix A (p. iv).

A discussion of confirmation of the Plan and the cram-down provision is not premature.

Consideration of confirmation of the Plan and the cram-down provision is not irrelevant or premature.

These petitioners, and those in Nos. 33, 36 and 37, have discussed every aspect of the application of "force" or "compulsion" to effect a plan of reorganization. One of the aspects which they have discussed is the scope of the cram-down provision.

Furthermore, the various provisions of Section 77 should be considered in relation to each other, not in a vacuum. It is well recognized that "the development, approval, confirmation, and consummation of a plan of re-

organization are not mere steps of an ordinary law suit". *In re Chicago, R. I. & P. Ry. Co.* (C. C. A. 7, 1947) 160 F. 2d 942, 945, cert. den. sub. nom. *Chase National Bank, Trustee* v. *Cheston* (1947) 332 U. S. 793, reh. den. (1947) 332 U. S. 826.

While a decision at this juncture that the Plan should or should not be confirmed would be premature, since any decision as to confirmation should be made on the basis of the situation that exists at the time when the matter comes up for decision, it is not premature to consider the petitioners' contention that the Plan cannot be confirmed merely because it is opposed by the St. Joe Paper Company. Their contention is that under the cram-down provision it is not possible to override a "strong dissent" by "a single large class".

The unqualified phraseology of the cram-down provision and the decisions establish that it will apply to a majority in amount of the holders of the First and Refunding Mortgage Bonds.

The cram-down provision relates generally to any class of stockholders or creditors, regardless of the size or importance of the class or the proportion (whether in amount or number) which may have voted against the plan. There is no limitation or qualification with respect to size, importance, and number of classes voting against the plan or the percentages. Those things are not mentioned.

The decisions applying the cram-down provision have made no distinction in its application on the basis of the size of an opposing class or the number of classes or the percentages recorded as in opposition. *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495; *In re Chicago, R. I. & P. Ry. Co.* (1947) 160 F. (2d) 942; cert. den; *Chase National Bank, Trustee* v. *Cheston* (1947) 332 U. S. 793, reh. den. (1947) 332 U. S. 826; *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.* (C. C. A. 2, 1947), 161 F. 2d 413, cert. den.;

Protective Committee for Bonds of Old Colony Railroad Co. v. New York, New Haven & Hartford Railroad (1947), 331 U. S. 858, reh. den. (1947) 332 U. S. 803.

In the *Denver & Rio Grande* case the holders of the General Mortgage Bonds, whose adverse vote was overridden, were the second largest class of creditors and the only class which the plan did not undertake to pay in full. Of the bonds voted, 79.33% voted against the plan (see above, p. 86).

In the *Rock Island* case two classes of creditors voted to reject the plan, of which one, the holders of the Convertible Bonds, held claims of $32,228,000 (exclusive of accrued interest) and 75.78% of the bonds voted were recorded as opposed.* The Court of Appeals did not mention minorities or indulge in any mathematical calculations. Instead it gave a succinct summary of the holding of this Court in the *Denver & Rio Grande* case (160 F. 2d p. 945):

> "Under this statute a rejection would not be reasonably justified unless the rejectors have a valid reason for rejecting the plan. If there is a rejection, the court will reexamine the plan, but if the plan is found to be fair and equitable to the dissenters, they cannot use the elements making the plan fair and equitable as the basis of their rejections. Reconstruction Finance Corp. v. Denver & R. G. W. R. Co., supra, 328 U. S. 534, 66 S. Ct. 1303. Thus it is clear that the court's discretion is not unlimited, but is circumscribed, and until the statute is satisfied, no discretion is vested in the court."

In the *Old Colony* case the bondholders who voted against the plan comprised the only class of bondholders of Old Colony Railroad Company. A majority in amount of those which were voted were recorded as against the plan.

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* For the amount of the claim see the table in *Chicago, R. I. & R. Ry. Co. v. Fleming* (C. C. A. 7, 1946) 157 F. 2d 241, 247. For the vote see page 5773 of the printed Court record in *In the Matter of the Chicago, Rock Island and Pacific Railway, Debtor* in the District Court of the United States for the Northern District of Illinois, Eastern Division, No. 53209.

The petitioners' construction of the cram-down provision would limit the application of that provision with respect to all plans whether they provide for mergers or not.

The petitioners' argument is that the Courts will not "override strong dissents by a large number of [interested] classes, or by a single large class" (St. Joe Paper Company brief, p. 31)—that the only purpose of the cram-down provision is to make it possible to have a plan confirmed "over the dissent of minorities" (Southern-Seaboard brief, p. 57). If such were the correct interpretation of the cram-down provision, it would apply to *any* type of plan.

Prior to the enactment of the cram-down provision a plan of reorganization could not be confirmed in the absence of a favorable vote of two-thirds in amount of each affected class (47 Stat. 1478). By the revision of Section 77 in 1935 and the addition of the cram-down provisions it became possible to have a plan confirmed regardless of either (1) the type of the plan or (2) the importance of a class which voted against the plan and the percentage in that class which was recorded as opposed.

On no theory can it be asserted that the cram-down provision became effective as to plans of reorganization which do not involve "mergers" and that it did not become effective as to a plan of reorganization which did involve a merger. Nor can it be contended that the effect of the provision depended in any way on the type of plan.

In short, the petitioners' argument about the cram-down provision does not really involve mergers at all. It involves a proposition which, if correct, would apply to all plans: that the cram-down provision was intended only to apply to a dissident minority.

We showed under the preceding subheading that that proposition is untenable.

Since the meaning of the cram-down provision is plain, there is no occasion for recourse to legislative history.

The petitioners' attempt to emasculate the cram-down provision by resort to legislative history is their second attempt, relating to a single statute, to vary the plain intent of the statute by citing legislative history data.

It is unnecessary to point out that, since the cram-down provision itself is plain there is no warrant for a resort to legislative history. *Ex parte Collett* (1949) 337 U. S. 55, 61; *Unexcelled Chemical Corp.* v. *United States* (1953) 345 U. S. 59.

However, it is suitable to note especially one of the extraordinary features of this case:

Section 77 contains a group of provisions relating to approval of a plan of reorganization by the Commission and the Court. It also contains a provision relating to confirmation. The provisions relating to approval and those relating to confirmation are well drafted, clear and explicit.

Nevertheless, the petitioners seek to avoid the effect of *both* by resorting to legislative history data which are largely irrelevant and, where relevant, either adverse to the petitioners' contentions or quite nebulous. Some of the data are cited as relating to "forced mergers". Other data are cited as relating to the restricted effect of the cram-down provision. As noted under the preceding subheading, the cram-down provision does not relate merely to merger plans—it relates to all plans—and the petitioners are trying to have their legislative history data prevail over the explicit provisions of Section 77 in two important respects, not merely one.

The petitioners' legislative history data do not tend to support their contention.

The item most stressed by the petitioners is a statement in Commissioner Eastman's Report of the Federal Coordinator of Transportation issued in January, 1935. There are only two items cited in the St. Joe Paper Company brief, and it is one of them (p. 31). It is also cited in the Southern-Seaboard brief (p. 58) and in the Railway Labor Executives' Association brief (p. 26-27).

The sentence which the St. Joe Paper Company brief stresses reads as follows (p. 31, italics supplied in St. Joe Paper Company brief):

> "Arbitrary compulsion of plans over the dissents of the interested classes is not intended, *nor is it believed that the courts will override strong dissents by any large number of such classes, or by a single large class,* excepting where it is established that they have no interest in the property."

This same part of Commissioner Eastman's Report (and additional parts) were cited to this Court in the brief of the Trustees of the General Mortgage in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495. At the very beginning of the argument in the brief in the *Denver & Rio Grande* case counsel for the General Mortgage Trustee said (p. 36):

> "It is obvious that the intent of Congress in adding to Section 77 this so-called cram-down provision was to prevent selfish and unreasonable minorities from staging a hold-up, and to make it impossible for such minorities to take advantage of their nuisance value to drive an unconscionable bargain."

That, of course, is almost precisely what counsel for St. Joe Paper Company say now (p. 18-19):

> "And the legislative history hereinafter disclosed confirms the view that the cram-down power of the

court was designed only to prevent disruption of a plan, otherwise valid and acceptable, by part or all of a class of security holders seeking to blackmail their way into a preferred position."

On the following page of the *Denver & Rio Grande* brief (p. 37) it was argued that Congress intended "that the cram-down provision should be used sparingly" and there was a quotation from Commissioner Eastman's Report containing the sentence which we have quoted above (p. 37-38). An extract from the Report, fuller than the quotations in any of the briefs herein, was attached to the brief as an appendix.

This Court did not accept the argument thus made in the *Denver & Rio Grande* case.

While this should dispose of this item of legislative history, it can also be disposed of on other grounds:

Mr. Eastman's Report, which is dated January 21, 1935, discussed a draft revision which was materially different from the revision adopted by the Congress on August 3, 1935. With the Report Mr. Eastman transmitted a draft revision of Section 77, which is Appendix X to the Report (p. 105, 238). That draft revision differed from the revision finally adopted by the Congress in three important respects:

(1) It provided that:

"Any creditor who has failed to file a claim in accordance with the provisions of subsection (c) hereof or any creditor or stockholder who fails to accept or reject a plan in the manner and within the time specified by the Commission shall be conclusively deemed to have consented to the plan."

(2) It substituted the words "one-half" for the words "two-thirds" in the provision of subsection (e) relating to the acceptance of a plan by creditors and stockholders.

(3) The "cram-down" provision did not contain the requirement that the court find "that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts".

Thus Mr. Eastman's idea was to treat all of those who did not vote as in favor of the plan and to reduce the percentage of favorable votes required for confirmation, so as to make it much harder to have an adverse vote as defined in the statute and thus to make the "cram-down" provision of subsidiary importance. The proposal to treat those who did not vote as voting in favor of the plan was the key to his proposal. Doubtless the reasonable expectation at the time (which has been confirmed by experience) was that usually large percentages of the securities of all classes would not be voted at all.*

The changes adopted by the Congress were materially different from those proposed by Mr. Eastman:

(1) It was not provided that those who did not vote should "be conclusively deemed to have consented to the plan".

(2) The statutory percentage was not reduced from two-thirds to one-half.

(3) The clause which uses the words "reasonably justified" was inserted.

The inescapable inferences are that:

The Congress did not like Mr. Eastman's proposal that those who had not voted on the plan should be counted as voting in favor of it.

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* As railroad securities are largely unregistered, great difficulty has been encountered in even notifying bondholders of their opportunity to vote. And, as is to be expected, many bondholders who hear of the submission will not take the trouble to write for, fill in and mail ballots.

The Congress saw the pitfalls in which it would fall if it attempted a definition of a "dissident minority".

The Congress appreciated that a vote does not establish what is "compatible with the public interest" and "fair and equitable".

The Congress was satisfied that the sanction for a plan should be *determinations* by the Commission, subject to the review of the Courts as to what was "compatible with the public interest" and "fair and equitable".

The Congress therefore rejected any idea of a "majority" as a criterion of anything and in the 1935 revision of Section 77 it omitted any reference to a majority.

It follows that what Mr. Eastman said in the Report in connection with his proposed revision of Section 77, which was not adopted, cannot have any significance in interpreting the revision of Section 77 which was adopted.

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Both the Southern-Seaboard brief (p. 57) and the R. L. E. A. brief (p. 24) quote a sentence from the same Report about "the dissent of minorities". In view of the foregoing discussion of the Report, no further comment about that quotation is necessary.

The two excerpts from the Coordinator's Report are the only items of the legislative history data which are cited anywhere except in the Southern-Seaboard brief. As already noted, the Report discusses a draft revision of Section 77 which was quite different from that finally adopted.

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The next item of so-called "legislative history" cited in the Southern-Seaboard brief (p. 59), is an article published in 1936 by Messrs. Leslie Craven and Warner Fuller, *The 1935 Amendments of the Railroad Bankruptcy Law* (1936), 49 Harv. L. Rev. 1254.

A reading of the article in its entirety establishes that Mr. Craven, who was counsel to Mr. Eastman as Federal Coordinator of Transportation, was a believer in the fundamental proposition that it is sounder to have the treatment of security holders decided by impartial determinations, rather than by votes, and he specifically indicated that the votes should be merely advisory, just as this Court later held in the *Denver & Rio Grande* case (p. 1280-1282). However, apparently *Louisville Joint Stock Land Bank* v. *Radford* (1935) 295 U. S. 555 raised serious questions in Mr. Craven's mind as to the constitutionality of a provision under which a determination by the Commission (subject to the review of the court) would be conclusive all by itself (p. 1282-1283). Apparently he believed that any danger that the "cram-down" provision would be held unconstitutional would be minimized if it could be characterized as a mere "procedural" provision, and if it could be argued that the "cram-down" provision was needed as a protection against "obstructive minorities". Presumably he used the sentences containing those expressions with that in mind. In any event, the sentences purport only to explain the reasons why the "cram-down" provision was added and neither says that the "cram-down" provision is limited in its application to "minority holders" or "obstructive minorities".

If the Congress had intended to restrict the application of the "cram-down" provision to "minority holders" or "obstructive minorities", the 1935 revision of Section 77 would have so provided and doubtless there would have been a definition of those terms.

• • • • •

The St. Joe Paper Company brief (p. 29-30) and the Southern-Seaboard brief (p. 37-38) stress a statement made by Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, at a hearing in 1939 when

amendments of the Interstate Commerce Act were under consideration:

> "I have repeatedly said that you could not get a bill to force consolidations, or to have in here a provision that the Commission should have an opportunity of carrying on investigations of the subject to try to force consolidations, and so forth. So, as far as this committee is concerned, with reference to this bill, you are just wasting our time in talking about consolidations, because that subject is out the window."

The St. Joe Paper Company brief then says (p. 30):

> "This incident shows beyond cavil that the Congress understood at that time that the Commission had not had its powers over mergers enlarged in 1935."

It is too plain to require argument that Senator Wheeler was talking about a general program of forced consolidations, applicable to solvent railroads, which would be carried out by the Interstate Commerce Commission under the Interstate Commerce Act. He was not talking about the power which the Commission *and the Courts* had under Section 77 of the bankruptcy act to transfer the property of a bankrupt to another railroad corporation pursuant to a plan of reorganization.

• • • • •

The Southern Seaboard brief next discusses at some length an article by Mr. Warner Fuller entitled *"Background and Techniques of Railroad Reorganizations"*, 7 Law and Comtemp. Prob., 377, published by the Duke University Law School. Mr. Fuller's 1940 article says nothing about "minority holders" or "obstructive minorities". It attributes the passage of the "cram-down" provision to a desire to avoid cash payments to "dissenting classes". Even if it were contemporary "legislative

history", it would shed little light on the issues on which this Court passed in the *Denver & Rio Grande* case.

* * * * *

If it were suitable to have recourse to legislative history, it would be found that there are items of legislative history which appear definitely to confirm that the Congress did not intend to have the "cram-down" provision limited in its application to "dissident minorities".

1. During the debate in the Senate Senator King of Utah inquired of Senator Hastings about the application of the "cram-down" provision. Senator Hastings had been in charge of the original Section 77 in 1933 and was a member of the Committee on Interstate and Foreign Commerce. The following is taken from the Senate debate on August 20, 1935:*

> "Mr. King: Suppose the 1 class out of the 20 or 30 or even 70 held a preponderating interest in the corporation, either in the stock or the bonds or as a creditor, and the corporation or person holding the preponderating interest objected, could it or he be forced to accept the terms?
>
> Mr. Hastings: They could be under this plan, always with the approval of the court and with the right of appeal if the court dealt unfairly with them.
>
> Mr. Wheeler: Mr. President, will the Senator yield?
>
> Mr. Hastings: I yield.
>
> Mr. Wheeler: Not only must it be approved by the court, but it must be approved also by the Interstate Commerce Commission".

2. Another significant item was called to the attention of this Court in the *Denver & Rio Grande* case by the successful parties. The Trustee of the General Mortgage of the Denver contended that, if the petitioners' construction of the "cram-down" provision were adopted (and that was

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* 79 Congressional Record, Part 13, page 13766.

the construction which was subsequently adopted by this Court), the effect would be to make the submission for voting a useless gesture. Their successful opponents pointed out, however, that a vote would call particular attention to the objections of any particular class that cast an adverse vote and would help the Court in a reexamination of the Plan. In that connection, they quoted from Mr. Eastman's testimony before the Judiciary Committee. They said in their brief, in part (p. 105):

> "Respondents are misled by the mere mechanics of the voting into rigid concepts that defeat the Congressional purpose. The voting is not, as they urge, a useless gesture unless it operates to give some power to veto. On the contrary, it requires a reexamination of the merits of the plan by the court and throws a spotlight on the situation of any particular class that may dissent, thus aiding the court to focus on the pertinent questions. This was clearly put to the Judiciary Committee by Mr. Eastman himself, in words we think decisive here, not only as an episode of legislative history, but also as a formulation of the applicable policies:
>
> 'Nothing can be forced upon them without an adjudication of their rights in accordance with sound principles which are definitely stated in the bill, and by two tribunals, the Commission and the court; and before any such adjudication is made, they are given opportunity not only to argue their rights and to submit what evidence they may desire to submit at public hearings, but to vote upon any plan before it is made effective, in order that the court may be fully informed in regard to the position of each and every class of security holders, whether they be debtors or creditors.'"
>
> ""Hearings before Committee on the Judiciary on H. R. 6249, 74th Cong., 1st Sess. (1935) 282."

An examination of the *Denver & Rio Grande* opinion establishes that this view was adopted (328 U. S. 533-535),

and, although the opinion makes no explicit reference to what Mr. Eastman said at the hearings, it is evident that the Court treated the provisions of the Act (as revised) for a submission and subsequent confirmation as intended to provide only for a reexamination of the plan with particular attention centered on the rights of any of those who had rejected it. The Court said (328 U. S. p. 534):

> "Under subsection (e), note 9 *supra*, the judge automatically confirms a plan after a vote of classes of creditors if satisfied that two-thirds of each class have accepted it. If there is a rejection, there is a reexamination of the plan to assure that those who dissent have had fair and equitable treatment. Apparently the reexamination for this treatment does not differ from that for the original court approval under the first paragraph of subsection (e). It does, however, center upon the rights of those who rejected the plan."

On the point now urged by the petitioners, that the "cram-down" provision is applicable only to a minority, the argument in the joint brief of the successful parties in the *Denver & Rio Grande* case (the Insurance Group Committee, the corporate trustees of four Mortgages and the Reconstruction Finance Corporation) contains a succinct summary which merits quotation (p. 105):

> "Of course the Act draws no distinction, in this power to confirm over a dissent, according to the percentages of the vote, whether the dissent is a minority of the vote, or a majority of the vote or the whole of the vote, but confers the power equally in all situations of the vote."

XIII.

There is no constitutional question which should affect the construction of Section 77.

The St. Joe Paper Company brief says (p. 27-28):

> "In the opinions of Judges who have considered this case, there is mentioned as a substantial constitutional point the question whether forcing the equiable owners of the Florida East Coast to part with that property and accept securities of another railroad company in payment, instead of money, violates the Constitution. State statutes providing for a fundamental change in the capital structure or in the nature of the business of corporations generally provide that dissenting stockholders be paid off in money the appraised value of their shares. It does not appear necessary to press this constitutional point. This Court has often said that if a case is susceptible of the two solutions, one of which raises a constitutional question and the other does not, the Court will adopt the view which avoids the constitutional question. *Crowell* v. *Benson*, 285 U. S. 22, 62; *United States* v. *Rumely*, 345 U. S. 41, decided March 9, 1953, by this Court."

The Southern-Seaboard brief says (p. 55):

> "As Circuit Judges RUSSELL and BORAH well said in their dissent below, the gravest question of the constitutionality of the 'cram-down' provision is raised by the construction and use here made of that clause by the majority of the Commission and approved by the majority of the Court of Appeals below. Under the settled principle this Court should avoid a construction that raises such question. *Crowell* v. *Benson*, 285 U. S. 22, 62; *United States* v. *Rumely*, 345 U. S. 41, 46, decided March 9, 1953."

In *United States* v. *Rumely*, (1953) 345 U. S. 41, Justice FRANKFURTER for the Court referred to "the prin-

ciple of constitutional adjudication which makes it decisive in the choice of fair alternatives that one construction may raise serious constitutional questions avoided by another" (p. 45). He then said:

> "In a long series of decisions we have acted on this principle. In the words of Mr. Chief Justice TAFT, '[i]t is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality.' *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346. Again, what Congress has written, we said through Mr. Chief Justice (then Mr. Justice) STONE, 'must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity.' Lucas v. Alexander, 279 U. S. 573, 577. As phrased by Mr. Chief Justice HUGHES, 'if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell* v. *Benson*, 285 U. S. 22, 62, and cases cited."

Chief Justice TAFT in *Richmond Screw Anchor Co.* v. *United States*, Chief Justice HUGHES in *Crowell* v. *Benson* and Justice FRANKFURTER in *United States* v. *Rumely* all referred to a *"serious"* constitutional doubt and in referring to a choice between possible constructions of the statute Chief Justice HUGHES used the word *"fairly"* and Justice FRANKFURTER used the word *"fair"*.

It is therefore fitting to ask:

Precisely what is the constitutional question which is said to exist? Is it a serious question?

What construction of Section 77 is claimed to make it unnecessary to consider the constitutional question? Is it a fair construction?

Consolidated Rock Products Co. v. *DuBois* (1941) 312 U. S. 510, 530 and *Ecker* v. *Western Pacific Railroad Company* (1943) 318 U. S. 448 established that (312 U. S. 530):

> "If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid. So long as they receive full compensatory treatment and so long as each group shares in the securities of the whole enterprise on an equitable basis, the requirements of 'fair and equitable' are satisfied."

It is a settled feature of railroad reorganization law that claims of creditors may be satisfied by the distribution to them of securities which constitute "the equitable equivalent of the rights surrendered". Exchanges are not required to be made on the basis of dollars or "dollar values". *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943) 318 U. S. 523, 565-566:

> "A requirement that dollar values be placed on what each security holder surrenders and on what he receives would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process. * * * It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered. That requires a comparison of the new securities allotted to him with the old securities which he exchanges to determine whether the new are the equitable equivalent of the old. But that determination cannot be made by the use of any mathematical formula."

Prior to this Court's decision in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495 it was vigorously argued that *Louisville Joint Stock Land Bank* v. *Radford* (1935) 295 U. S. 555 established that the bondholders had a constitutional right

to a foreclosure sale (267 I. C. C. 303). The *Denver & Rio Grande* decision effectively disposed of that argument. We have quoted the pertinent parts of the *Denver & Rio Grande* opinion in the respondent's brief in No. 36 at pages 26-27.

The Southern-Seaboard brief speaks of "the gravest question of constitutionality of the 'cram-down' provision" just as if the *Denver & Rio Grande* case had never been decided.

In the *Denver & Rio Grande* case the General Mortgage bondholders of the Denver & Rio Grande had to "part with" their bonds and "accept securities of another railroad company, in payment, instead of money". The St. Joe Paper Company brief indicates that the Plan in this case would require "the *equitable owners* of the Florida East Coast to part with *that property*", but the only possible question relates to forcing the holders of a majority in amount of a class of bonds to surrender bonds.

In both the *Rock Island* and *New Haven* reorganizations the holders of mortgage bonds which were secured by a first lien on a particular line of railroad were required to accept, over their adverse vote, new bonds and stock representing smaller percentage interests in an aggregation of properties. *In re Chicago, R. I. & P. Ry. Co.* (C. C. A. 7, 1947) 160 F. 2d 942, 945; cert. den. *Chase National Bank, Trustee* v. *Cheston* (1947) 332 U. S. 793; reh. den. (1947) 332 U. S. 826. *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.* (C. C. A. 2, 1947) 161 F. 2d 413, cert. den. *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & Hartford Railroad Co.* (1947) 331 U. S. 858, reh. den. (1947) 332 U. S. 803.

What, then, is the serious constitutional question? And what fair construction will avoid it?

Certainly it cannot make any difference from a constitutional point of view that the transfer in this case will be

to a so-called "outsider" railroad. Whatever issue there may be as to a construction of Section 77, there can be no doubt that constitutionally Congress can authorize a transfer to an "outsider" railroad if it has the power to authorize a transfer within a system or to another debtor and there can be no remaining constitutional doubt as to the latter power.

XIV.

The District Court's dismissal of the reorganization proceedings under Section 77 was not justified and the Court of Appeals was correct in so finding.

The alternative equity plan, which is referred to in Point IV of the St. Joe Paper Company brief, is a thoroughly bad plan. In three important respects it conflicts directly with findings of the Interstate Commerce Commission.

The program for a dismissal of the proceedings and the attempt to put through the alternative equity plan in the reactivated receivership cannot be defended. Among other things it involved an attempt to circumvent the authority of the Interstate Commerce Commission over reorganization plans, whether under Section 77 or in equity.

The whole program was a bald effort of the St. Joe Paper Company and a small group of associated bondholders completely to dominate the reorganization and to try to force the Commission to acquiesce in and authorize a plan which would be incompatible with the public interest and not as favorable to the unrepresented bondholders as the Commission's Plan.

The St. Joe Paper Company brief concludes with a point which is designed to establish that the dismissal of the organization proceedings under Section 77 of the Bankruptcy Act was justified (p. 32). Half of the discussion is devoted to the alternative equity plan, about which we have written above at pages 40-43.

It seems to us too plain to require argument that the St. Joe Company's brief's point is outside of the scope of

the question which this Court has agreed to review. Presumably the St. Joe Paper Company would like to obtain from this Court something in the nature of an informal approval of the dismissal of the proceeding and an informal blessing on the alternative equity plan.

The delay and the power to dismiss the proceeding.

The brief points out that this case has been in the courts twenty-two years, of which twelve have been spent in the Section 77 proceeding. However, it is worth noting that almost ten were spent in the prior equity receivership, there was then a transfer to the Section 77 proceeding, and yet the District Court ordered a re-transfer to the equity receivership, which had proved fruitless.

The brief says that the dismissal by the Court "was recommended by Commissioners Mahaffie, Splawn and Lee (R. Vol. I, Fifth Supplemental Report, p. 191)." An examination of page 191 of the Fifth Supplemental Report will show that the statement is not correct. It is true that the three Commissioners said they would "approve a plan for internal reorganization," but they made no reference to a dismissal of the proceeding.

The alternative equity plan.

We have summarized some of the major objections to the alternative equity plan in our statement of the case (p. 40-43). The plan is in plain conflict with the Commission's findings on three important subjects; (1) control, (2) amount of bonded indebtedness and (3) provision for passenger stations, particularly a passenger station at Miami. Other objections to the plan are mentioned above at pages 42-43.

If the program for a dismissal were carried out, there would have to be applications to the Interstate Commerce

Commission under Section 5* and Section 20a of the Interstate Commerce Act.

The application under Section 5 would be bound to raise the question of St. Joe Paper Company control and the Commission has already decided several times that St. Joe Paper Company control would not be compatible with the public interest (see above at page 45). The Section 20a application would involve directly the amount of new bonds that could be issued and a consideration of a reserve for new passenger stations, including a passenger station at Miami, would certainly be essential in the Section 20a proceeding.

Those who formulated the alternative equity plan and devised the program for a dismissal of the proceeding undoubtedly hoped that the District Court would approve the alternative equity plan and that the Commission would yield its convictions and grant Section 5 and Section 20a authority.

If the Commission failed to do that, then the Bondholders' Agreement and the St. Joe Paper Company's promise to accept unequal treatment would cease to be binding. The holders of the $11,000,000 of unrepresented Bonds would be left to fare as best they could.

In our review of the history of railroad reorganization at pages 96-104 we have referred to the objections made by the Commission in the 1920's that under the equity reorganization procedure so much had been done before Section 5 and Section 20a applications were filed with the Commission that the Commission's choice was ordinarily to approve or disapprove a virtual *fait accompli*.

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* Section 5 has been construed to require Commission authority for a transfer of the assets of a carrier to a new carrier which is organized to carry out a plan of reorganization. *Minneapolis & St. Louis Railroad Company Reorganization* (1941) 244 I. C. C. 347, 360. *Seaboard Air Line Railroad Company Receivership* (1944) 257 I. C. C. 683.

The program for a dismissal of the proceeding and the approval of the alternative equity plan in the equity receivership is open to all of the objections which the Commission made to equity receiverships in the 1920's and has a unique feature which was not to be found in the old equity procedure. In the *Milwaukee* and other reorganizations about which the Commission complained, neither the parties nor the Court knew what the Commission's views were until the Section 5 and Section 20a applications were filed and the Commission's only complaint was that it did not have an opportunity to pass on Section 5 and Section 20a matters until a late hour. In this case the parties knew, when the alternative equity plan was formulated, that the Commission had long considered and carefully made findings, as to St. Joe Paper Company control, the amount of bonded indebtedness and the necessity of a reserve for passenger stations, and those who developed the alternative equity plan did so in the teeth of the Commission's findings.

The program for a dismissal of the proceeding and the alternative equity plan are a striking example of what it would mean if a holder of a majority in amount of a class of bonds had the *power* which the St. Joe Paper Company seeks. The Commission's Plan has been found to be not merely compatible with the public interest but advantageous to the public in many respects, and "most favorable" to the bondholders as a class (see above, p. 45-47). While the alternative equity plan has not been passed upon by the Commission or by any Court, it is only necessary to lay it beside the Commission's Reports to see the grave conflicts between the plan and the Commission's findings. Yet the St. Joe Paper Company now casually asks this Court to find that the dismissal of the reorganization proceedings was justified and impliedly asks for a blessing on the alternative equity plan.

CONCLUSION.

The order of the Court of Appeals should be affirmed.

ated, October 6, 1953

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i

THE STATUTES

Attributes of a Plan of Reorganization.

SECTION 77(b)—first paragraph in full.[1]

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations,* the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not

[1] The text of all Section 77 provisions is taken from 11 U. S. C. A. § 205. Italics are supplied.

less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; *and may include any other appropriate provisions not inconsistent with this section.*

Approval of a Plan by the Commission.

SECTION 77(d)—first paragraph in part.

• • • the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

Approval of a Plan by the Court.

SECTION 77(e)—first paragraph and first sentence of second paragraph.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties

in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor,

and he shall enter an order in which he may either dismiss the proceedings or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received.

Confirmation of a Plan—the "Cram-down" Provision.

Section 77(e)—third paragraph in part.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interest or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):* • • •.

The So-Called "Consistency Clause".

Section 77(f)—fifth sentence

Upon confirmation of a plan, the Commission shall, without further proceedings, grant authority for the issue of

any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and *not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.*

Section 5 of the Interstate Commerce Act—Pertinent Provisions.[1]

UNIFICATIONS, MERGERS, AND ACQUISITIONS OF CONTROL.

(2) (a) *It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision* (b)—

(i) *for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier,* or two or more carriers jointly, *to purchase,* lease, or contract to operate *the properties,* or any part thereof, *of another;* or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) *Whenever a transaction is proposed under subparagraph* (a), *the carrier* or carriers or person *seeking*

[1] The text is taken from 49 U. S. C. A. § 5. Italics are supplied.

authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e)), *and shall afford reasonable opportunity for interested parties to be heard.* If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1)

the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commisson that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order

such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

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CONTROL EFFECTED BY OTHER THAN PRESCRIBED METHODS

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

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PLENARY NATURE OF AUTHORITY UNDER SECTION

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modication of its powers under its corporate charter or under the laws of any State.